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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. _____ and No. _____

No. .....

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased; JOHN C. LINCOLN; HELEN E. BING, Trustee of the Estate of Sol R. Bing, Deceased; and HENRY GEORGE SCHOOL OF SOCIAL SCIENCE, a Corporation,

PETITIONERS,

vs.

THE UNION TRUST COMPANY, a Corporation, East 9th Street & Euclid Avenue, Cleveland, Ohio; PAUL A. MITCHELL, Superintendent of Banks of the State of Ohio, in charge of the liquidation of The Union Trust Company; THE NATIONAL CITY BANK OF CLEVELAND, Trustee under Agreement and Declaration of Trust, dated August 15, 1924; UNION PROPERTIES, INC., a corporation; and HAROLD B. BURDICK, THE FIRST CENTRAL TRUST COMPANY, Trustee under the Deed of Trust of Frederick W. Work, HENRY W. MATHEWS, ALICE L. SCOTT, and RALPH STICKLE, Successor Trustee under the Will of Andrew J. Bause, Deceased,

RESPONDENTS.

No. .....

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased; JOHN C. LINCOLN; HELEN E. BING, Trustee of the Estate of Sol R. Bing, Deceased; and HENRY GEORGE SCHOOL OF SOCIAL SCIENCE, a Corporation,

PETITIONERS,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924; H. EARL COOK, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Union Trust Company; THE UNION TRUST COMPANY, a Corporation; UNION PROPERTIES, INC., a Corporation; and HAROLD B. BURDICK, THE FIRST CENTRAL TRUST COMPANY, Trustee under the Deed of Trust of Frederick W. Work, HENRY W. MATHEWS, ALICE L. SCOTT, and RALPH STICKLE, Successor Trustee under the Will of Andrew J. Bause, Deceased,

RESPONDENTS.

PETITION FOR WRITS OF CERTIORARI.

For their petition, Cary R. Alburn, Trustee under the last will and testament of Charles H. Salmons, deceased, John C. Lincoln, Helen E. Bing, Trustee of the estate of

Sol R. Bing, deceased, and Henry George School of Social Science, a corporation, on behalf of themselves and all others similarly situated, by their attorneys, respectfully represent to this Honorable Court:

STATEMENT OF THE CASE.

The parties in the two cases before this Court are identical. The central issue in both was the same,—whether a certain Agreement and Declaration of Trust was valid. Both were tried and decided together. The first action, entitled *Alburn, Trustee, etc., et al. vs. The Union Trust Co., etc., et al.*, in this Court, was instituted by the petitioners, as beneficiaries of the trust, asking for a declaratory judgment as to its validity. The second action, entitled *Alburn, Trustee, etc., et al. vs. National City Bank of Cleveland, Successor Trustee, etc., et al.*, in this Court, was subsequently filed by the Successor Trustee, asking for a decree quieting title. The facts are these:

The Union Trust Company, of Cleveland, Ohio, owned a parcel of land which had cost the bank $310,000. In 1924, it prepared and executed an Agreement and Declaration of Trust in which it declared itself trustee of the land. It then issued and sold to its trust customers and to various trust estates of which it was fiduciary, "land trust certificates" representing 2,000 undivided interests in the equitable ownership of the property. The purchasers of these certificates, who became the beneficiaries of the trust, and who now number about 200, paid for the trust property $2,005,906.53 (QTR 28, DJR 36-37).[1] In addition to

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[1] QTR means Record in Quiet Title action, *Alburn, Trustee, etc. et al. vs. National City Bank of Cleveland, Successor Trustee, etc. et al.*; DJR means Record in Declaratory Judgment action, *Alburn, Trustee, etc., et al. vs. The Union Trust Co., etc. et al.* Most of the facts are contained in the petitioners' amended petition in the Declaratory Judgment action, and amended cross petition in the Quiet Title action, the allegations of which are substantially identical. These facts were all admitted to be true by the demurrers of the respondents which were sustained by the Ohio courts.

the profit in excess of $1,695,000 derived by the bank in the sale of the property to its own trust, the bank reserved to itself, by the terms of the trust indenture, all net income of the trust property in excess of $110,000 annually, thereby realizing an additional profit of $10,000 per year (QTR 28, DJR 37). The trust indenture also provided an annual fee of $3,600 to the bank for administering the trust (QTR 28, DJR 37).

The Union Trust Company administered the trust until June 15th, 1933, when the Superintendent of Banks of the State of Ohio took possession of the assets and business of the bank for liquidation (DJR 35).

On October 31, 1933, National City Bank of Cleveland, as the result of an ex parte proceeding, became successor trustee and has administered the trust ever since (QTR 26, 29, DJR 38).

On April 24, 1935, the Supreme Court of Ohio, in the case of *Ulmer vs. Fulton*, 129 O. S. 323, 195 N. E. 557, held that such a trust was void, that title to the trust property never vested in the trustee but remained in the bank creating the trust and that the certificate holders were general creditors of the bank in the amount paid for the trust property. Severely condemning the banks which had devised these transactions, the court stated that they were contrary to the public policy of the state and were entirely beyond the statutory authority of trust companies; that no action or inaction of any of the parties thereto, no estoppel, could be asserted to give them any legal effect (QTR 29, DJR 38-39).[2]

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[2] The *Ulmer* decision was later confirmed by the Ohio Supreme Court in *Haggerty vs. Squire*, 137 O. S. 207, 28 N. E. (2d) 554 (1940), and uniformly followed by the lower courts. *Arend vs. Fulton, Supt.*, 53 Ohio App. 503, 5 N. E. (2d) 792 (1936), Motion to Certify overruled October 7, 1936; *Gallagher vs. Squire, Supt.*, 57 Ohio App. 222, 13 N. E. (2d) 373 (1937), Motion to Certify overruled October 27, 1937; *Grant vs. City Trust & Savings Bank*, 26 Ohio L. Abs. 227 (1937).

As a result of the *Ulmer* decision, the Superintendent of Banks, on June 17, 1935, issued a written directive to all open banks in Ohio ordering them to terminate such trusts promptly, restore the assets to the banks and pay the beneficiaries the amount paid for the assets. (This directive is set forth in full in QTR 30 and DJR 39.)

At the same time, the Superintendent of Banks filed suit to retrieve the assets of those invalid trusts which he had transferred out of liquidating banks to successor trustees, recognizing the beneficiaries as creditors of the banks.[3]

On August 3, 1936, in accordance with an agreement reached between them, the Superintendent of Banks sent a letter to the Successor Trustee stating that the case of *Ulmer vs. Fulton* had raised the question of the ownership of the property; that the rights and interests of the Superintendent of Banks and the certificate holders had not yet been determined; that until they were determined, the Successor Trustee could continue to administer the property without prejudice to the rights of any of the parties; that in the event it was "finally determined" that the property was an asset of The Union Trust Company, the superintendent would, under certain conditions, honor all leases. (This agreement is set forth in full in QTR 31-32 and DJR 40-41.)

Notwithstanding the Agreement of August 3, 1936, and the action taken by the Superintendent of Banks in all other such trusts, neither the Successor Trustee nor the Superintendent of Banks took any action to have the validity of this trust determined. The interests of the certificate holders required a determination of the validity of the trust for two compelling reasons:

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[3] *Arend vs. Fulton*, *supra*; *Gallagher vs. Squire*, *supra*; *Grant vs. City Trust & Savings Bank*, *supra*; *State ex rel. Squire vs. Central United National Bank, Trustee*, 20 Ohio L. Abs. 238 (1935); *State ex rel. Squire vs. National City Bank, Trustee*, 24 Ohio L. Abs. 160 (1936); *State vs. Krause*, Cuyahoga County Common Pleas, No. 431174 (1936).

(1) As long as he validity of the trust remained in doubt, the value and marketability of the trust property and the land trust certificates were seriously affected (DJR 42).

(2) If the trust were invalid, as it appeared to be, the beneficiaries had no interest in the property and their only recourse was against the bank, and since the bank was in the process of liquidation, a timely determination was necessary to enable the beneficiaries to participate in the assets of the bank before they were completely distributed.

Upon being appised of the facts, some of the petitioners and other beneficiaries of the trust, in 1942, filed a representative action, *Stanley et al. vs. Hart et al.*, the "Hart" case, to set aside the trust, for a money judgment against The Union Trust Company, and for a claim against the Superintendent of Banks in the amount of the judgment. By a three to three decision, the Supreme Court of Ohio, 142 O. S. 528, 53 N. E. 2d 197 (1944), affirmed the judgment of the Court of Appeals of Cuyahoga County, holding that under the McIntyre Act, Section 710-92a, Ohio General Code, effective April 21, 1937 (Appendix A), the certificate holders were barred from recovery as creditors of The Union Trust Company (QTR 5 and DJR 43-44). At the same time the Court *declined to adjudicate the validity of the trust* (QTR 5 and DJR 44), thereby still leaving the title to the trust property and to the land trust certificates in serious doubt

A group of beneficiaries, among whom were some of the petitioners herein, thereupon sought an adjudication of validity through a mandamus action filed in the Supreme Court, *Stanley et al. vs. Cook et al.*, 146 O. S. 348, 66 N. E. (2d) 207 (1946), the 'Cook" case, praying for a writ ordering the Superintendent of Banks to set the trust aside. The Supreme Court, by adivided decision, five to two, refused

to issue the writ and *again declined to determine the validity of the trust* (146 O. S. 359, DJR 71).

Ten years had now elapsed since the agreement between the Successor Trustee and the Superintendent of Banks was made, contemplating a determination of the validity of the trust. Neither had taken any action and both had effectively prevented the certificate holders from obtaining a determination, and the title of the certificate holders was still beclouded. The Union Trust Company had been in liquidation thirteen years. If the trust were invalid, it was necessary to have a determination before the assets of the bank were completely distributed; otherwise the certificate holders might lose both their property and any chance of recovering their purchase money.

On May 8, 1946, the petitioners filed, in the Common Pleas Court of Cuyahoga County, their action for a declaratory judgment, one of the two cases before this Court, praying for a determination of the validity of the trust. The Successor Trustee and the Superintendent of Banks demurred (DJR 26-27) and were joined, for the first time, by the Burdick group of certificate holders (DJR 28-29), some of whom had made separate settlements with the Superintendent of Banks (DJR 43).

On June 8, 1946, while the Declaratory Judgment action was pending, the Successor Trustee filed, in the same court, a petition to quiet title in which were named as defendants only the Superintendent of Banks, The Union Trust Company and Union Properties, Inc., who promptly filed disclaimers of any interest in the property.

The petitioners, not having been named as parties defendant nor even notified of the suit, but having chanced to learn of it, obtained leave, against the strenuous resistance of the Successor Trustee, to file an answer and cross petition (QTR 21, 1) on the ground that the Successor Trustee did not represent them on the issue of the validity of the trust and that they were necessary parties to a determination of that issue.

In their answer the petitioners generally denied the Successor Trustee's allegations (QTR 26), and in their cross petition they asserted the invalidity of the trust (QTR 27-33). The Burdick group of certificate holders also intervened, admitting the validity of the trust (QTR 49, 50, 7, 9-10).

The Successor Trustee filed a motion to strike the petitioners' answer on the ground that they were not necessary or proper parties (QTR 45-46) and all of the other parties, except the Superintendent of Banks and The Union Trust Co., demurred to the petitioners' cross petition (QTR 7, 9-10).

The Common Pleas Court sustained demurrers to all of the petitioners' pleadings in both cases asking for affirmative relief[4] and at the same time struck from the files the answer of the petitioners in the Quiet Title suit (QTR 10). It then issued a decree *pro confesso* quieting title in the Successor Trustee (QTR 6-11). No evidence was adduced. Although expelling the petitioners, who were beneficiaries of the trust, from the case and denying them a hearing, the court did not expel the other beneficiaries, who had taken a position contrary to that of the petitioners, and permitted them to participate in the hearing on the merits (QTR 6-11).

In addition to depriving the petitioners of any hearing, the court precluded them from *ever* having a hearing by enjoining them from asserting any claim inconsistent with the trustee's title, except on direct appeal (QTR 11).

In four separate lawsuits, litigated over a period of six years, the beneficiaries of the trust have been unable to obtain a judicial determination of the validity of the trust. In the first two suits, the *Hart* and *Cook* cases, the Ohio courts refused to rule on the issue of validity. In the

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[4] The court sustained the demurrers to the petition and amended petition in the Declaratory Judgment action (DJR 4-5) and to the amended cross petition in the Quiet Title action (QTR 9-10).

last two suits, the court held that the beneficiaries were not even entitled to a hearing and determined the question of validity without their participation, striking their answer in the Quiet Title suit and enjoining them from ever asserting their claim. The end result, after the many years of litigation, is that there still is not a judicial determination of validity.

While the Quiet Title decree impliedly determined the validity of the trust, it was rendered ineffectual, first, by the arbitrary expulsion of necessary parties from the hearing, and, secondly, by the court's own assertion, in its Opinion, that the validity of the trust was not involved and, therefore, not adjudicated (QTR 77, 81).[5]

In the meantime, the beneficiaries' property rights are still beclouded and insecure,—in a state of legal paralysis; and they are in jeopardy of losing both their property and their purchase money, for if there is no adjudication before The Union Trust Company is liquidated, they may eventually be confronted with a decision of invalidity with their only source of relief, the assets of The Union Trust Company, irretrievably gone.

QUESTIONS PRESENTED.

1. In an action to quiet title brought by a trustee, involving the issue of the validity of the trust, certain beneficiaries denying the validity of the trust are granted leave to become parties defendant and to file an answer of general denial. Other beneficiaries, admitting the validity of the trust, are also granted leave to become parties. The court strikes the answer of the beneficiaries denying validity and expels them from the case, but permits the beneficiaries admitting validity to remain as parties. The

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[5] The Court of Appeals said in its Opinion: "Nothing in the petition to quiet title can be found requiring any adjudication of the validity of the trust" (QTR 77). And: "Accordingly, the court in these cases is not required to pass upon the validity or invalidity of the trust * * *" (QTR 81).

court then issues a decree *pro confesso*, quieting title in the trustee, thereby determining the validity of the trust, and further enjoins the beneficiaries who denied validity and were expelled from the case from asserting any claim contrary to the title of the trustee.

Is not the action of the court a deprivation of due process under the XIVth Amendment to the United States Constitution because it deprived the beneficiaries who asserted invalidity of any opportunity to be heard and enjoined them from bringing any further proceeding to assert their rights, at the same time granting to the trustee and beneficiaries who maintained validity the right to a hearing?

2. The validity of a trust is in serious doubt. If invalid, the beneficiaries have no equitable ownership of the property of the trust and their sole recourse is a claim for the purchase price of the property against the bank which created the trust, sold the property to the trust, and is now in liquidation. In a suit brought by the beneficiaries, the court has held that a three-month non-claim statute bars them from asserting claims as general creditors of the bank, but at the same time the court has refused to determine the validity of the trust, leaving insecure and doubtful the property rights of the beneficiaries and placing them in the jeopardy, in the event that the trust is eventually declared invalid, of losing both their property and the money paid for it. In three additional suits, the courts refused to determine the validity of the trust. Under such circumstances, are not the beneficiaries entitled, under the due process clause, to a hearing and judicial determination of the validity of their trust, so that (a) if the trust is valid, their property rights would be made secure and freely marketable, and (b) if the trust is invalid, the beneficiaries would have the opportunity to assert their claims against the bank before it is completely liquidated, and if the court should hold that the beneficiaries are entitled neither to their property nor to any recourse against the

bank by reason of the short non-claim statute, they may have the right to appeal to the Federal courts upon the constitutionality of the statute?

BASIS OF THE JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under that portion of Section 1257(3) of the Judicial Code, 28 U. S. C. Sec. 1257(3), Act of June 25, 1948, 62 Stat. 869 which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by this Court by writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the constitution of the United States.

In the Assignments of Error and briefs filed in the Court of Appeals of Cuyahoga County, to which the petitioners appealed from the judgments rendered in each case by the Common Pleas Court of said county, the petitioners alleged that the said judgments were in violation of the petitioners' rights to due process and equal protection of laws under the XIVth Amendment to the Constitution of the United States.[6]

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[6] In the Quiet Title action, the federal questions were raised by the 7th and 8th Assignments of Error filed in the Court of Appeals (QTR 59) and by Section IV-B (pp. 25-26) and Section IV-C-4 (pp. 36-37) of the Court of Appeals' brief (QTR 84-85) to which the 8th Assignment of Error referred. The petitioners contended that the XIVth Amendment was violated by the judgment of the Common Pleas Court:

(a) in that the petitioners' answer was stricken and they were denied a hearing (QTR 85),

(b) in that the court sustained the demurrers to their cross petition, thereby holding that the Successor Trustee could invoke the power of the court for the determination of the validity of the trust, whereas they, the beneficiaries, could not (QTR 84-85), and

(c) in that the court interpreted the McIntyre Act as barring them from an adjudication of their property rights (QTR 59).

(*Continued on following page*)

In affirming both judgments of the Common Pleas Court, the Court of Appeals decided that said judgments did not constitute a denial of the said provisions of the United States Constitution, whereupon the petitioners, in both cases, appealed as of right and filed motions to certify to the Supreme Court of the State of Ohio, the highest court of said State, in which they alleged that the judgments of the Court of Appeals should be reversed because they were in violation of the petitioners' rights to due process and equal protection of laws under the XIVth Amendment.[7]

(Continued from preceding page)

In the Declaratory Judgment action the federal questions were raised by the 5th and 6th Assignments of Error filed in the Court of Appeals (DJR 48) and Section IV-C-4 (pp. 36-37) of the Court of Appeals' brief (DJR 84-85). The petitioners contended that the due process clause of the XIVth Amendment was violated by the judgment of the Common Pleas Court:

(a) in that the court sustained the demurrers to their amended petition, thereby holding that while the Successor Trustee could invoke the power of the court for the determination of the validity of the trust, the beneficiaries could not (DJR 84-85), and

(b) in that the court interpreted the McIntyre Act as barring them from an adjudication of their property rights (DJR 48).

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[7] In the Quiet Title action, the federal questions were raised in the Notice of Appeal (as of right) filed in the Supreme Court (QTR 62-64) and in the 6th and 7th Assignments of Error filed in said court (QTR 67-68). The petitioners contended that the judgment of the Common Pleas Court, as affirmed by the Court of Appeals, was in violation of the petitioners' rights to due process under the XIVth Amendment:

(a) in that the petitioners were deprived of a hearing on the merits of the validity or invalidity of the trust (QTR 63 and 67-68), and

(b) in that the court interpreted the McIntyre Act as depriving the petitioners of both their property and purchase money (QTR 68).

In the Declaratory Judgment action, the federal questions were raised in the Notice of Appeal (as of right) filed in the

(Continued on following page)

The Supreme Court of Ohio overruled the motions to certify and dismissed the appeals as of right on the ground that no debatable constitutional questions of law were involved, 150 O. S. 357, Ohio Bar, 11-22-1948 (QTR 16-17 and DJR 9). The petitioners filed applications for rehearing, alleging again that the judgments of the Common Pleas Court as affirmed by the Court of Appeals, constituted a denial of the said provisions of the United States Constitution (QTR 70-75 and DJR 56-59).

The Supreme Court denied both applications for rehearing on November 10, 1948 (QTR 17 and DJR 9).

REASONS FOR ALLOWANCE OF THE WRITS.

In holding that the judgments of the lower courts in the two cases did not, in any respect, deprive the petitioners of their right to due process under the XIVth Amendment of the United States Constitution, the Ohio Supreme Court decided federal questions of substance. The judgments deprived the petitioners, whose rights were directly involved, of any hearing on the issue of the validity of the trust; enjoined them from ever having a hearing upon the issue; and left their property rights so doubtful and insecure that their value and marketability were seriously affected and, in fact, subjected to the jeopardy of total loss for the reason that the trust might be declared invalid after complete liquidation of the bank and all hope of recourse against it gone.

(Continued from preceding page)

Supreme Court (DJR 51-52) and in the 5th and 6th Assignments of Error filed in said court (DJR 54-55). The petitioners contended that the judgment of the Common Pleas Court, as affirmed by the Court of Appeals, was in violation of their rights to due process under the XIVth Amendment:

(a) in that the petitioners were deprived of a hearing on the merits of the validity or invalidity of the trust (DJR 51-52 and 54), and

(b) in that the court interpreted the McIntyre Act as depriving the petitioners of both their property and their purchase money (DJR 55).

The decision of these federal questions by the Ohio Supreme Court are not in accord with the decisions of this Court holding:

(1) It is a denial of due process for a court to deprive a party of a hearing in the trial of a matter affecting his rights, by arbitrarily striking his answer from the files and issuing a decree *pro confesso* against him. *McVeigh vs. U. S.*, 78 U. S. (11 Wall.) 259, 20 L. Ed. 80 (1870); *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Hovey vs. Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841 (1897),

(2) It is a denial of due process for a court, while granting a hearing to some members of a class who maintain that an agreement is valid, to deny or fail to grant a hearing to other members of the same class who maintain the agreement is invalid. *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940); *McArthur vs. Scott*, 113 U. S. 340, 28 L. Ed. 1015, 5 S. Ct. 652 (1885); *Smith et al. vs. Swornstedt*, 57 U. S. 288 (16 How.) 14 L. Ed. 942 (1853),

(3) It is a denial of due process for a court to attempt to enforce a judgment which is void because a hearing has been denied to parties whose rights were affected by the judgment. *Hansberry vs. Lee, supra; Windsor vs. McVeigh, supra; McArthur vs. Scott, supra.* In the foregoing cases the courts attempted to enforce a void judgment by declaring it *res judicata* or entitled to full faith and credit. In the instant case, the court attempted to enforce the void quiet title decree by an injunction prohibiting the petitioners from relitigating the issue determined by the decree, and

(4) It is a denial of due process for the courts of a state to refuse or fail to accord a party any adequate remedy in which to enforce his legal rights. *Marino vs. Ragen*, 332 U. S. 561, 92 L. Ed. 203, 68 S. Ct. 240 (1947); *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930); *Lee Van Woods vs. Nierstheimer*, 328 U. S. 211, 90 L. Ed. 1177, 66 S. Ct. 996 (1945).

Although, in the Quiet Title action, the court issued a decree which, on its face, determined the validity of the trust, the court rendered the decree ineffectual by expelling the petitioners, who were necessary parties to a determination of validity, from the trial. The decree is, therefore, void and subject to collateral attack. (Cases cited in paragraphs 1 and 2 above.) If the decree were valid, it was further rendered ineffectual to determine the validity of the trust because the court expressly stated that the issue of validity was not involved (QTR 77). There has thus been a complete failure to determine the validity of the trust, leaving the property rights of the beneficiaries doubtful, insecure, and in peril.

WHEREFORE, the petitioners respectfully pray that writs of certiorari be issued, directed to the Supreme Court of Ohio, to review the decisions of the said court in the two above described cases, entitled in the Supreme Court of Ohio, "*Cary R. Alburn, Trustee, etc., et al., vs. The Union Trust Company, et al.,*" No. 31,524, and "*National City Bank of Cleveland, Successor Trustee, etc., et al. vs. H. Earl Cook, Superintendent of Banks of the State of Ohio, etc., et al.,*" No. 31,525; and that the petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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Attorneys for Petitioners,
Cary R. Alburn, etc., et al.

Of Counsel:

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The Common Pleas Court delivered no opinion in the Quiet Title action. Its opinion in the Declaratory Judgment action is reported in 51 Ohio Law Abs. 65, 80 N. E. (2d) 721, and appears in DJR 60-82.

The Court of Appeals delivered a *per curiam* opinion covering both the Quiet Title and Declaratory Judgment actions. It was not reported but appears in QTR, pages 76-81, and DJR, pages 86-91. The Supreme Court wrote no opinion in either case, 150 O. S. 357, Ohio Bar, 11-22-1948.

An analysis of the opinions appears upon pages 26-29 of this brief.

II.

JURISDICTION.

The grounds upon which this Court has jurisdiction are set forth in the Petition, *ante*, pages 10-12.

III.

FACTS.

The facts are set forth in the part of the Petition entitled "Statement of the Case," *ante*, pages 2-8.

IV.

ARGUMENT.

The section of the Petition entitled "Reasons for Allowance of Writs," *ante*, pp. 12-14, is a summary of the following Argument.

A. It Was a Denial of Due Process for the State Courts, in the Quiet Title Suit, to Have Stricken Petitioners' Answer, Issued a Decree by Default Against Them and Enjoined Them from Thereafter Asserting Their Rights. The Decision of the Ohio Supreme Court that Such Action Was Not a Denial of Due Process is in Conflict with Decisions of This Court.

From the time the beneficiaries filed their first suit to determine the validity of the trust, the Successor Trustee was hostile to them because they asserted its invalidity, believing that under the *Ulmer* decision, which had declared such trusts opposed to public policy, the courts would have no alternative other than to adjudge it void.[8] On the other hand, the Successor Trustee contended throughout that it was its duty to maintain the validity of the trust, although a trustee is under no duty to a beneficiary to comply with an illegal trust and ordinarily he is under a duty not to comply. *Restatement of the Law of Trusts, American Law Institute*, Sec. 166.

So opposed was the Trustee to the petitioners that although it had failed for ten years to bring any action to determine validity, it resisted every effort of the petitioners in that direction. When, finally, the petitioners filed the Declaratory Judgment action, in which the controversy with the Successor Trustee was alleged (DJR 43), the Trustee sought to circumvent it by filing its own quiet

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[8] It is uniformly held that a court will not enforce an agreement that is void as against public policy and that even if the invalidity is not pleaded, the parties seek to waive invalidity or consent to its validity, it is the court's duty, *sua sponte*, to refuse to enforce it. *Coppell vs. Hall*, 74 U. S. (7 Wall.) 542, 558, 19 L. Ed. 244 (1868); *Oscanyan vs. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 (1880); *Morrill vs. Nightingale*, 93 Calif. 452, 28 Pac. 1068 (1892); *Richardson vs. Buhl*, 77 Mich. 632, 43 N. W. 1102 (1889); *Camp vs. Bruce*, 96 Va. 521, 31 S. E. 901 (1898); *Waychoff vs. Waychoff*, 309 Pa. 300, 163 A. 670 (1932).

title petition[9] without notifying the petitioners. The parties named as defendants in this action, The Union Trust Company, Superintendent of Banks and Union Properties, Inc., were *only those who admitted the validity of the trust.*

Under these circumstances, there could be no binding decree in the Quiet Title suit, determining the validity of the trust, unless the beneficiaries who had asserted invalidity were parties and given an opportunity to be heard.

> "In a suit in Equity brought by the trustee against a third person, the beneficiary ordinarily is not a necessary party, although he is a proper party. He is a necessary party only if a complete determination of the controversy cannot be had unless he is made a party, *as where the suit involves a controversy between the trustee and beneficiaries or a controversy among beneficiaries.*" (Italics supplied.) *Restatement of the Law of Trusts,* American Law Institute, Section 230-i. Also, *Bogert, Trusts and Trustees,* 1946, Section 593; *Perry on Trusts and Trustees,* 7th Edition, 1929, Section 873; *Commonwealth Trust Company vs. Smith,* 266 U. S. 152, 69 L. Ed. 219, 45 S. Ct. 26 (1924); *Shirk vs. Walker,* 298 Mass. 251, 10 N. E. (2d) 192 (1937); *Noel vs. Noel,* 173 Md. 152, 195 Atl. 315 (1937).

Where the validity of a trust is in question, all *cestuis* are necessary parties. *Hutchins vs. Security Trust and Savings Bank,* 208 Calif. 463, 281 Pac. 1026 (1929).

The Common Pleas Court had, in fact, held the petitioners were necessary parties by permitting them to inter-

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[9] In the Quiet Title petition, the Successor Trustee alleged that The Union Trust Company created the trust out of its own property, declared itself trustee and issued and sold certificates of equitable ownership in the property (QTR 18-21). These were the ultimate facts underlying the decision in *Ulmer vs. Fulton,* holding such trusts void and thus squarely raised the issue of the validity of the trust. The Successor Trustee also alleged that The Union Trust Company and the Superintendent of Banks, as its liquidator, asserted some claim in and to the property, which created a cloud upon the title of the Successor Trustee (QTR 21). Such a claim could only be predicated upon the holding in the *Ulmer* case that the title never passed out of the bank.

vene and to file their answer and cross petition (QTR 21, 1, 25-33). All of the parties indispensable to a complete, valid and binding decree were then present, but the Successor Trustee moved to strike the petitioners' answer on the ground that they were not necessary or proper parties (QTR 45-46), and such motion was granted (QTR 10), although no similar effort was made to dismiss the other group of beneficiaries, who admitted the validity of the trust.

After the answer was stricken, the court issued its decree *pro confesso*, quieting title in the Successor Trustee (QTR 6-11)[10] and although the petitioners were no longer in the case, enjoined them from setting up any claim adverse to the Trustee's title (QTR 11).

The due process clause of the Federal Constitution requires an opportunity to be heard. *Truax vs. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921); *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930).

> "The due process clause requires that every man shall have the protection of his day in court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial. * * *" *Truax vs. Corrigan, supra*, 332, 263, 129.

Striking an answer from the files and rendering judgment by default is a denial of due process. *McVeigh vs. U. S.*, 78 U. S. (11 Wall.) 259, 20 L. Ed. 80 (1870); *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Hovey vs.*

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[10] In the decree quieting title the court found that neither The Union Trust Company nor the Superintendent of Banks had any "interest in the said premises" (QTR 9) and that the Successor Trustee was the "owner in fee simple" (QTR 7). The court ordered "title" to be quieted in the Successor Trustee as against The Union Trust Company and the Superintendent of Banks (QTR 6-11). The decree thus purportedly determined that the trust was valid.

Elliott, 167 U. S. 409, 42 L. Ed. 215 (1897); *Restatement of Law of Judgments*, American Law Institute, Section 6f.

In *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876), McVeigh sued in Ejectment to recover his land, which the U. S. had acquired in a libel suit and conveyed to Windsor. The libel suit was predicated on an Act of Congress, July 17, 1862, to seize and confiscate property of persons who had performed certain designated acts of rebellion. The District Court of Virginia in which the libel was filed, published a monition and notice in response to which McVeigh entered an appearance and filed an answer, claiming he was entitled to the property. A motion to strike his answer on the ground that he was a rebel was granted and a decree *pro confesso* issued. This Court held that the judgment was void, as violative of due process. In its opinion, the court, speaking through Mr. Justice Field, stated, at pages 278, 916:

> "It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence. * * * The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him."

Commenting upon the fact that the court invited McVeigh to file an answer but after it was filed, struck it from the files, the court said, at pages 278, 916:

> "It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree in condemnation. * * *"

The foregoing language is directly applicable to the case at bar in which the court, after giving permission to the petitioners to file an answer, struck the answer from the files and issued the decree.

This Court had occasion to consider the same question and reached the same conclusion in *Hovey vs. Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897), in a case where a party's answer was stricken and a default judgment entered against him because he refused to obey an order of the court to deposit certain moneys with the court.

Expelling the petitioners from the trial while at the same time permitting another group of beneficiaries, who had taken a contrary position, to participate therein, brings this case within the purview of another decision of this Court in which it was held that such action was a violation of due process. *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940). Here, a group of landowners, purporting to represent 500 landowners of a certain area, brought suit to enforce a restrictive covenant against sale or lease to any member of the colored race. Hansberry, a member of that race, who had purchased land within the area, was not made a party. The restrictive agreement required 95% of the frontage landowners to sign it before it became valid. The Supreme Court of Illinois held the agreement was valid. Subsequently, Hansberry litigated the question in the Federal courts where it was held that the judgment in the state court was *res judicata* of the question of the validity of the agreement. This Court reversed the judgment, holding that due process was violated and the judgment void, since the members of the class maintaining a contrary position had not been made parties to the case. The case was remanded to the state court to allow Hansberry the right to be heard on the validity of the agreement. At pages 45, 29, this Court, speaking through Mr. Justice Stone, said:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The

doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far."

To the same effect are *Smith, et al., vs. Swornstedt*, 57 U. S. (16 How.) 288, 14 L. Ed. 942 (1853) and *McArthur vs. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015 (1885).

Most of the due process cases decided by this Court, involving the denial of a hearing, are not direct appeals from the initial action in which the hearing was denied, but are appeals from a subsequent attempt to enforce the judgment in the original action. *Windsor vs. McVeigh, supra*; *Hansberry vs. Lee, supra*; *McArthur vs. Scott, supra.* This Court has, however, exercised jurisdiction in direct appeals from the initial judgment in which due process was denied and has held that it is not necessary to wait for an attempt to enforce the judgment. *Riverside & Dan River Cotton Mills vs. Menefee*, 237 U. S. 189, 59 L. Ed. 910, 35 S. Ct. 579 (1915).

The instant case, however, is on all fours with those in which an attempt to *enforce* the initial void judgment was the subject of appeal. The injunction against the petitioners from asserting any claim adverse to the Successor Trustee's title was an attempt by the court to enforce the decree quieting title fully as much as a subsequent judgment holding the quiet title decree *res judicata* or entitled to full faith and credit. In the instant matter, however, the injunction is much more oppressive than the ordinary *res judicata* judgment, for it imposes upon the party a threat of imprisonment if he attempts to litigate the question.

B. The Failure of the Ohio Courts to Accord to the Beneficiaries Any Remedy Adjudicating the Validity of the Trust, Leaving Their Property Rights Insecure and in Peril, Was a Denial of Due Process and in Conflict with Decisions of This Court.

In all of the litigation, beginning with the initial case of *Stanley vs. Hart*, the certificate holders urged the courts to pass upon the validity of the trust, but the Superintendent of Banks and Successor Trustee resisted it. In the *Hart* and *Cook* cases they stated it was not "necessary" to determine the validity of the trust, and the courts declined to adjudicate that question. When, in the hearing before the Ohio Supreme Court in the *Cook* case, Bell, *J.*, stated from the Bench that the issue of validity would have to be determined and asked counsel for the Superintendent in what forum it would be determined, counsel answered that it could be decided in a declaratory judgment action brought by the petitioners. Yet, when the petitioners filed the Declaratory Judgment action promptly after the decision in the *Cook* case, the same counsel demurred on the ground that the certificate holders were not entitled to such a determination.

When the Successor Trustee filed its Quiet Title suit, the beneficiaries again attempted to have the validity of the trust judicially determined by joining issue with the Successor Trustee and by filing a cross petition asserting invalidity (QTR 25-33). The demurrers to the petition in the Declaratory Judgment action and to the cross petition in the Quiet Title suit were sustained and the answer of the beneficiaries stricken. Then they were enjoined from ever again raising the question (QTR 6-11 and DJR 4-5).

Thus there has been no determination of the validity of the trust. While the court in the Quiet Title suit issued a decree quieting title which, on its face, impliedly determined the trust to be valid, the court rendered the decree ineffectual by expelling the beneficiaries from the case and

denying them a hearing. The absence of these necessary parties in the hearing on the merits made the decree void and subjected it to collateral attack. (*Ante*, pages 19-21, where are cited and discussed *McVeigh vs. U. S.*, *Windsor vs. McVeigh*, *Hovey vs. Elliott*, *Hansberry vs. Lee*, and other cases.)

As said in the *Restatement of the Law of Judgments*, American Law Institute, Section 6f:

> "Thus, if the court arbitrarily strikes out any answer which the defendant makes to the claim and renders judgment against him, the judgment is void."

As if to make certain that the validity of the trust was *not* determined, the Court of Appeals said in its opinion:

> "Nothing in the petition to quiet title can be found requiring any adjudication of the validity of the trust." (QTR 77.)

And:

> "Accordingly, the court in these cases is not required to pass upon the validity or invalidity of the trust of August 15, 1924. * * *" (QTR 81.)

Thus, even if the decree were valid and binding, a future court might well hold that it did not determine validity since the petition did not *expressly* raise the issue, since the decree did not *expressly* adjudicate the issue, and since the court *expressly* stated that the issue was not involved. (*U. S. National Bank of Vale vs. Shehan*, 98 Ore. 155, 193 Pac. 658 (1920); *State vs. Bank of Commerce*, 96 Tenn. 591, 36 S. W. 719 (1896); *Re Sanford Fork & Tool Company*, 160 U. S. 247, 40 L. Ed. 414, 16 S. Ct. 291 (1895).)

The failure of the court to determine the issue of validity on the amended petition of the beneficiaries in the Declaratory Judgment action was a denial of due process, particularly in view of the fact that the courts had refused to determine the issue in the previous litigation and did not determine it in the Quiet Title suit.

A party's right to sue in a court having jurisdiction of the parties and cause of action, includes the right to prosecute his claim to judgment. *Washington-Southern Navigation Company vs. Baltimore & Philadelphia Steamboat Company*, 263 U. S. 629, 635, 68 L. Ed. 480, 44 S. Ct. 220 (1924); *McClellan vs. Carland*, 217 U. S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762 (1910).

Where a party has filed suit for a determination of his property rights and the court has jurisdiction of the parties and subject matter, it is the duty of the court to proceed to judgment and a writ of mandamus will issue if the court stays the proceeding to permit the defendant to file and prosecute an independent suit involving the identical question and parties. *McClellan vs. Carland, supra.*

The state courts must, under the Federal due process clause, afford a party a remedy for a determination of his rights. *Marino vs. Ragen*, 332 U. S. 561, 92 L. Ed. 203 (1947); *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930); *Lee Van Woods vs. Nierstheimer*, 328 U. S. 211, 90 L. Ed. 1177, 66 S. Ct. 996 (1946).

In the *Brinkerhoff* case, a bank sought to enjoin an assessment of its stock at 100% value while assessing other property at only 75%. The Missouri Supreme Court affirmed a judgment dismissing the petition on the ground that the bank was guilty of laches because it had failed to complain to the tax commission. Earlier Missouri Supreme Court decisions had held that the tax commission had no authority to hear such cases. Reversing the Missouri Supreme Court, this Court, speaking through Mr. Justice Brandeis, said:

> "We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it is denying to the plaintiff due process of law, using that term in its primary sense, of an opportunity to

be heard and to defend its substantive right." (678), (1112)

"First, it is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." (678), (1112)

"Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (682), (1114)

In the case of *Marino vs. Ragen, supra,* decided last term, this Court held that a procedural labyrinth of inadequate remedies in state courts constitutes a denial of due process. In the instant matter, the beneficiaries have sought, by four separate forms of remedy, a determination of the validity of the trust:

(1) A suit in Equity to set aside the trust.

(2) A suit in mandamus to compel the Superintendent of Banks to set aside the trust.

(3) A suit for a declaratory judgment.

(4) An answer and cross petition in the Quiet Title suit brought by the Successor Trustee.

The issue has not yet been decided. If any further remedy be available to the petitioners, they cannot utilize it, for they have been enjoined from doing so.

So long as the courts fail to adjudicate the validity of the trust, the property rights of the beneficiaries must remain insecure, depressed in value and restricted in marketability. And if the issue is not determined before the liquidation of The Union Trust Company is completed, and this is close at hand, the beneficiaries are in danger of losing, by a declaration of invalidity, not only their property, but also any recourse they may have against the bank.

C. Analysis of Ohio Courts' Opinions.

The opinions are silent upon the court's action in striking the petitioners' answer nor are any grounds assigned for the issuance of the injunction.

The rationale of the court in sustaining the demurrers to the amended petition in the Declaratory Judgment action is based upon three premises:

(1) If the court determined the validity of the trust, it would have to hold it invalid.

(2) If held invalid, no benefit would accrue to the beneficiaries because they were barred under the *Hart* decision from recovery as general creditors of the bank.

(3) Since no benefit would accrue to them from a declaratory judgment, they were not entitled to a judgment.

Thus, the Common Pleas Court said, after stating that the certificate holders, as a result of the *Hart* decision, were barred from recovery as creditors of the bank:

> "It therefore appears to the court that the matter of the validity or invalidity of the trust is now an abstract and academic question, and as such is not subject to the action of a court of justice." (DJR 81.)

And the Court of Appeals, after commenting upon the fact that the beneficiaries were barred from recovery as creditors:

> "Accordingly the court in these cases is not required to pass upon the validity or invalidity of the trust of August 15, 1924, as no rights can depend upon such adjudication." (DJR 91.)

Notwithstanding these statements that the matter of the validity or invalidity was an abstract question and not subject to the action of a court of justice and that the court was not required to pass upon the question as no rights could depend upon such adjudication,—the court proceeded, in the Quiet Title action, to adjudicate the question.

Notwithstanding the inescapable premise of the court's reasoning,—that the court would have to decide the trust to be *invalid*, if it decided the question at all,—the court proceeded in the Quiet Title action to decide the trust *valid* (although ineffectually), by decreeing title good in the trustee.

The ground upon which the court denied the beneficiaries a determination of validity,—the decision in the *Hart* case barring them from recovery as general creditors of The Union Trust Company,—was the very reason which made it imperative for them to have a determination, for the protection of their rights. In the *Hart* case, the beneficiaries had been told they could not recover the purchase money for the property, but had not been told that the property was theirs, and they were in danger of losing both. Their property rights were in a state of legal paralysis which only a court could remedy by a determination of validity or invalidity. If the determination were "valid," their property rights would be secure and they would be able to market them at their fair value. If the determination were "invalid," they would have the opportunity to assert whatever rights they had against The Union Trust Company before its assets were entirely dissipated.

The *Hart* judgment did not necessarily preclude them from asserting rights against The Union Trust Company *after* a declaration of invalidity of the trust. It is a general rule of law that a right based upon the invalidity of an instrument or deed does not ripen into a claim subject to a statute of limitations until there has been a judicial determination of the invalidity of the instrument or deed.[11]

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[11] Deeds: *Garber's Administrator vs. Armentrout*, 73 Va. (32 Grattan) 235 (1879); *Beaty vs. Cruce*, 200 Mo. App. 199, 204 S. W. 553 (1918); *Johnson vs. Barnes*, 8 Ky. L. R. 956, 4 S. W. 176 (1887); *Elling vs. Harrington*, 17 Mont. 322, 42 Pac. 851 (1895). Bonds: *Gulf Life Insurance Company vs. Hillsborough County*, 129 Fla. 98, 176 S. 72 (1937); *Nuveen vs. Quincy*, 115

(Continued on following page)

Since the cause of action does not arise until after a declaration of invalidity, the bar period of a special statute of limitations such as the McIntyre Act would begin to run only from that time, if at all.[12]

If, as a result of a declaration of invalidity, the Successor Trustee had to reconvey the property to The Union Trust Company, the bank would be unjustly enriched, having both the property and the purchase money. Under such circumstances, Equity would give relief against the legal bar of the non-claim statute. Indeed, since the unjust enrichment would not take place until the actual return of the property to the bank, the claim based on unjust enrichment would not accrue until then, and the bar period of the special statute of limitations would begin to run only from that time, if at all.

If the Ohio courts, after a declaration of invalidity, held that the beneficiaries of the trust had no relief whatsoever, that they lost their property and could not recover from the bank by reason of the three-month bar of the McIntyre Act, the beneficiaries would be in a position to assert that the statute, so construed, is unconstitutional. Beneficiaries of such trusts are generally, as in the instant case, numerous, scattered and in no position to ascertain the facts, in order to assert a claim. They are the innocent parties whom the courts seek to protect in these transactions. On the other hand, the bank creating the trust is

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(Continued from preceding page)

Fla. 510, 156 S. 153 (1934); *Gillespie vs. Yell County*, 124 Fed. (2d) 632, C. C. A. 8 (1942); *Coffin vs. Board of Commissioners*, 114 Fed. 518, Aff'd. 126 Fed. 689, C. C. A. 8 (1903). Tax Sale Certificates: *Caruthers vs. Greer*, 92 Ark. 167, 122 S. W. 629 (1909); *Shea vs. Owyhee County*, 66 Idaho 159, 156 Pac. (2d) 331 (1945); *In re Harris*, 33 N. Y. S. 1102, Aff'd. 36 N. Y. S. 29 (1895); *Meriweather vs. Board of County Commissioners*, 150 Okla. 223, 1 Pac. (2d) 390 (1931).

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[12] *Zollman, Banks & Banking*, 1945 Supp., Sec. 6501; *Leal vs. Westchester Trust Company*, 279 N. Y. 25, 17 N. E. (2d) 673 (1938).

the guilty party, a violator of public policy and fair dealing. *Ulmer vs. Fulton, supra.* To construe the McIntyre Act to deprive the beneficiaries of both their property and their purchase money and to award both to the bank would raise a serious question of federal constitutionality.

Due process required that the court put an end to the uncertainty of the beneficiaries' property rights by determining whether the trust was valid or invalid. If valid, they would have been assured of their equitable ownership of the property. If invalid, and the court held that they had neither their property nor any rights against The Union Trust Company, they would have had the opportunity to appeal to this Court to test the constitutionality of a non-claim statute so harshly construed.

D. A Judicial Determination of the Validity or Invalidity of the Trust Is Necessary to Prevent Continued Impairment and Possible Total Loss of Beneficiaries' Property Rights.

The record is convincing that the validity of this trust is in doubt, seriously affecting the value and marketability of the beneficiaries' property rights and placing them in the peril of losing both the property and the purchase money as The Union Trust Company approaches the end of its liquidation.

In four separate lawsuits since 1942, the courts have refused to adjudicate the validity of the trust, finally enjoining the beneficiaries from any further attempt. When, in the Quiet Title suit, the court had all the necessary parties before it and had the opportunity to render a valid, binding judgment, it destroyed that opportunity by striking the answer of the petitioners and issuing a default decree quieting title. To make certain that the decree, which on its face necessarily determined validity, should *not* have that effect, the Court of Appeals expressly stated that the issue of validity was not involved,—and, therefore, not adjudicated.

Whenever they were confronted with the question of the validity of this trust, the judges of Ohio, like Pilate, when confronted with the question "What is Truth?" pulled up their robes and scurried from the judgment halls. St. John, Chapter XVIII, Verse 38.

The validity of this trust and the title to the trust property and the land trust certificates must always remain in doubt and insecure until there has been a full hearing of the issue in which all parties affected by the judgment have had their day in court, in person or by proper representation. This should take place before The Union Trust Company is entirely liquidated, so that if it is held that the trust is invalid, the beneficiaries may be able to enforce whatever rights they have against the bank.

Since the petitioners have been enjoined from taking any further proceedings, the only relief left to the beneficiaries of this trust is a review by this Court and an order that will insure a judicial determination of validity.

Respectfully submitted,

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APPENDIX A.

The McIntyre Act.

GENERAL CODE SECTION 710-92a.

Effective April 21, 1937.

§ 710-92a. Presentation and proof of non-book claims.

At any time subsequent to the expiration of the date for filing claims as fixed by the superintendent of banks, pursuant to the provisions of section 710-90 of the General Code, he may give notice by publication once a week for four consecutive weeks in a newspaper of general circulation in the county in which the principal office of such bank is located, requiring the presentation and proof of all general claims not filed and not appearing upon the books of the bank, at a place and time to be fixed in such notice, which time shall be not less than 60 days subsequent to the date of the last publication of such notice.

All claims not filed in accordance with the provisions hereof shall be forever barred from participation in any of the assets of such bank, and such notice shall so state. (117 v. 250, § 1. Eff. Apr. 21, 1937.)

In the Supreme Court of the United States

OCTOBER TERM, 1948.

Office Supreme Court
FILED
MAR 23 19
CHARLES ELMORE

No. 549 and 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,

Petitioners,

vs.

THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, et al.,

Respondents.

No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,

Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc., et al.,

Respondents.

No. 550.

REPLY BRIEF OF PETITIONERS.

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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,

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Respondents.

No. 550.

REPLY BRIEF OF PETITIONERS.

RESPONDENTS' BRIEFS.

The brief of the Attorney General of Ohio concludes with this statement:

> "We think valid reasons have been presented to this court for the exercise of its jurisdiction." (Atty. Gen.-11.)

In view of this statement the assertion of Union Properties, "There is no suggestion in the Attorney General's brief that any Federal question is here presented" (UP-16-17) is obviously incorrect. We believe the position of the Attorney General of the State of Ohio is particularly significant because he, as counsel for the Superintendent of Banks, and as a public official, is the only participant with

no pecuniary interest in the controversy. It is to be noted that the Attorney General is now handling these cases entirely in his own office in the State House; too often in the past the Superintendent of Banks has been represented by Special Counsel who simultaneously have acted on behalf of Union Properties, Inc. which, by reason of its private interests, has not occupied the disinterested position required of a public official.

The answer briefs of the three other respondents[1] are based upon common arguments and to conserve the time of the Court, petitioners will reply to them in this single brief.

FACTS OUTSIDE THE RECORD.

The facts to be considered are only those appearing in petitioners' pleadings to which the respondents' demurrers were sustained. Respondents have alleged many facts to which no references to the Record are made, which are outside the Record and which have no pertinency to the Federal questions involved. To respond to them would not only consume the time of this Court but would divert it from the real issues. Suffice it to say here that The Union Trust Company not only realized a profit in excess of $1,695,000.00 and the other profits alleged in the petition and cross-petition (QTR-28, DJR-27) but received an additional $1,000,000.00 (with a profit of more than $300,000.00) in a separate sale of the building, which one of the respondents implies went along gratuitously with the sale of the land to the Trust (UP-8). Almost all of the 200 beneficiaries of this Trust, many of whom reside outside of Ohio, never had any knowledge of the facts nor any choice to assert their rights until 1942 when the *Hart* case was filed; whereas a selected handful of beneficiaries, including members of the Burdick group, were given full in-

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[1] References to respondents' briefs are abbreviated as follows: Attorney General of Ohio, Atty. Gen.; National City Bank, Successor Trustee, NC; Union Properties, Inc., UP; and Harold B. Burdick, *et al.*, Burdick.

formation at an early date on the basis of which they made individual settlements with the Superintendent of Banks.

RESPONDENTS' CONTENTION WITH RESPECT TO THE STRIKING OF THE PETITIONERS' ANSWER IN THE QUIET TITLE SUIT.

Respondents' justification of the striking of petitioners' general denial to the quiet title petition of the Successor Trustee is that the general denial did not constitute a cause of action, was therefore demurrable (by way of motion to strike) and that an adequate hearing was given in permitting petitioners to file briefs and make oral arguments (UP-3-6, 12; NC-6-7, 11-14; Burdick-9). This argument is epitomized in National City's statement:

> "Their general denial of the allegations of the petition states no cause of action giving rise to a remedy." (NC-13.)

Union Properties offers the same argument more subtly phrased.[2]

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[2] On page 3 of its answer brief Union Properties says:

> "Petitioners' case rests upon the proposition that a party, whose pleadings have been found insufficient as a matter of law after a full hearing,—either on demurrer or on motion to strike,—and who was accorded a full opportunity to amend such pleadings, has been denied his day in court. Nothing could be more absurd."

Again, on page 12 of its answer brief, Union Properties states that the petitioners are guilty of

> "the wholly false assumption that a party whose rights are judicated by sustaining a demurrer or motion to strike—thus determining that his pleadings present no cause of action or no defense—has been denied a hearing."

And on page 13, the respondent says:

> "In ruling upon the merits of petitioners' case as presented by their pleadings, the lower courts did exactly what courts do *every day* in ruling upon demurrers or other questions arising upon pleadings."

It is to be noted that nowhere does Union Properties state that the "pleading" to which the motion to strike was addressed, was a *general denial.*

The contention that general denials may be stricken on the ground that they constitute demurrable causes of action, presents a new concept of judicial process which this Court may wish to review, since undoubtedly it has never before been submitted to it for consideration.

A parallel argument is urged by Union Properties with reference to the contention made by the Attorney General that the Ohio courts entirely ignored the issue of invalidity raised by the Superintendent of Banks' general denial to the cross-petition in the quiet title suit (Atty. Gen.-9). Union Properties seeks to justify the action of the Court by stating that the petitioners filed no reply to the general denial of the Superintendent and thus "admitted" the general denial (UP-4, Footnote 1). That a party must deny a general denial to his petition or suffer a dismissal thereof is also a novel concept of judicial process that should be reviewed by this Court in order to determine how many denials of denials are necessary to reach a litigable issue.

Respondents contend that the petitioners were accorded a "full and fair hearing" upon the question as to whether their general denial was demurrable. The permission to file briefs and make oral arguments *ad nauseam* on non-existent, extraneous trumped-up issues, injected to divert attention from and to prevent a hearing upon the real issue in the case, is not the kind of hearing guaranteed by the Fourteenth Amendment. As Mr. Justice Cardozo stated in *Palko vs. Connecticut,* 302 U. S. 319, 327, 82 L. Ed. 288 (1937):

> "The hearing, moreover, must be a real one, not a sham or a pretense."

The hearing guaranteed by the due process clause must be one not only in form, but in substance as well. *Mooney vs. Holohan,* 294 U. S. 103, 79 L. Ed. 791 (1934); *Moore vs. Dempsey,* 261 U. S. 86, 67 L. Ed. 543 (1923).

In the *Brinkerhoff-Faris* case, 281 U. S. 673, 74 L. Ed. 1107 (1930) discussed on page 24 of our original brief, the

Missouri courts went through all of the motions of a complete trial and appeal, but this Court, nevertheless, held that the petitioner was not accorded due process because it was never given the hearing upon the merits, to which it was entitled.

The striking of an answer of general denial and rendition of a default judgment is a violation of due process not only because the defendant is deprived of a hearing, but for another reason to which the respondents have addressed no argument. When the general denial is stricken the court loses jurisdiction to render any judgment against the defendant. As held in *Windsor vs. McVeigh*, 93 U. S. 247, 23 L. Ed. 914 (1876) discussed on page 19 of our original brief, the striking of their answer was in legal effect the recall of the citation and notice to the defendant, created a situation identical to one where the defendant is never notified and never appears, with the result that the judgment is void, not only because the defendant was granted no hearing, but because the court had no jurisdiction over the defendant and, therefore, no power to render judgment affecting his rights. Thus, the decree in the quiet title action purporting to adjudicate the validity of the trust, is void, not only because no hearing was afforded the petitioners, but because, having stricken the answer, the court had no jurisdiction to issue the decree. *A fortiori*, the injunction issued against the defendants after they were expelled from the case, is also void for lack of jurisdiction, and violative of due process.

RESPONDENTS' CONTENTION WITH RESPECT TO PETITIONERS' ARGUMENT THAT BENEFICIARIES HAVE BEEN DEPRIVED OF ALL REMEDIES, LEAVING THEIR PROPERTY RIGHTS INSECURE AND IN PERIL.

Two Federal questions have been presented to this Court. The first, arising from the striking of the general denial, was whether the petitioners' *procedural* rights under the due process clause were denied because they were

deprived of a hearing and because the Court issued a judgment purporting to bind them without having jurisdiction over them. This denial of procedural rights is the subject matter of the cases of *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Hovey vs. Elliott*, 167 U. S. 409, 42 L. Ed. 215 (1897); *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22 (1940); and *Riverside and Dan River Cotton Mills vs. Menefee*, 237 U. S. 189, 59 L. Ed. 910 (1915) discussed on pages 19-21 of our original brief.

The second question presented to the Court results from the persistent refusal of the Ohio courts to determine the validity of this trust and finally enjoining the petitioners from having a judicial determination. By depriving them of any remedy to enforce their right, the Court denied them due process as to a *substantive* right. The denial of a substantive right by depriving a party of his remedy is the subject matter of *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107 (1930), and *Marino vs. Ragen*, 332 U. S. 561, 92 L. Ed. 203 (1947) discussed on pages 24 and 25 of our original brief.

It is difficult to lay a finger on any concrete or specific argument of respondents in answer to this second proposition. Vague assertions are made that issues of the *Cook* and *Hart* cases are being re-litigated without specifying what issues. It is nowhere stated in respondents' briefs that the issue involved in these cases—the issue of the validity of the trust,—was adjudicated in the *Hart* and *Cook* cases. Not only had the lower courts in the declaratory judgment and quiet title actions expressly stated that the validity of the trust was not determined in the *Hart* and *Cook* cases (DJR-70, 71, 87; QTR-77), but the courts in the *Hart* and *Cook* cases expressly so stated. In the *Hart* case, the Supreme Court of Ohio, unable to agree, was equally divided, three voting to uphold the Court of Appeals' judgment and three to reverse it. The Court of Appeals merely held that the certificate holders were barred

from filing claims as general creditors and expressly stated in its journal entry that it was not deciding the issue of validity. In the *Cook* case the Supreme Court held that the remedy of mandamus did not lie because the Superintendent of Banks had no specific statutory duty to bring such a proceeding. The Supreme Court of Ohio in that case made no determination of the issue of invalidity, stating in its opinion:

> "Much of the relators' petition and reply is devoted to the claim that the trust is void. *We do not reach that question in this case.*" 146 O. S. 348, 359.

The statements ot Judge Turner frequently quoted in respondents' briefs were merely the *obiter dicta* of this Judge, not the law of the case, and related only to the rights of certificate holders as creditors. That the *Cook* case did not determine the issue of invalidity is further evidenced in the dissenting opinion of Judges Bell and Matthias, 146 O. S. 387:

> "This case should not be disposed of upon motion. Relators should be granted full opportunity to prove or attempt to prove the facts alleged and the respondent should be given an equal opportunity to prove his side of the controversy so that the court could dispose of the matter upon its merits, particularly in view of the admitted facts that the bank made a profit of over $1,000,000 by the sale of land trust certificates upon land which was its own property previous to the creation of the trust; that from 1924 to 1933 when it resigned as trustee it was enriched to the extent of about $100,000 additional; that it reserved to itself the sum of $10,000 per annum in perpetuity; and that it restricted the use of the Citizens Building located upon the land placed in trust to other than banking purposes for its own further benefit and profit, all of which acts were either expressly or by clear implication condemned in the *Ulmer* case. Therefore, we dissent from the judgment."

On page 384 Judges Bell and Matthias also stated:

"The validity of the trust being the only issue involved here, that question was never passed upon or determined."

In the oral argument before the Ohio Supreme Court in the *Cook* case, counsel for Union Properties, Inc. who was then also counsel for the Superintendent of Banks, engaged in the following colloquy with Judge Bell relative to the fact that the issue of validity was not adjudicated in the *Hart* and *Cook* cases and to the importance of having its adjudicated:

"Judge Bell: Mr. Burns, may I ask you a question?

Mr. Burns: Yes, Judge Bell.

Judge Bell: Suppose your motion for a judgment here is granted, that makes an end of this case, doesn't it?

Mr. Burns: Yes.

Judge Bell: What forum then will the certificate holders ever have to determine the question of whether the trust is valid? You say it is valid, the other side says it is invalid, both sides say that that question has never been litigated.

Mr. Burns: Yes.

Judge Bell: If we end this case here by sustaining this motion, doesn't that deny these certificate holders any forum in which they can ever test this question?

Mr. Burns: Oh, I don't think so at all. I think it can be tried by a quiet title proceeding in Common Pleas Court, any number of ways. The National City Bank as trustee, or if the National City Bank refused, a certificate holder could ask to have it determined. As a matter of fact, before the Hart case was filed, two of the original plaintiffs in that case filed an action for a declaratory judgment in the Common Pleas Court to have it determined whether the trust was valid or invalid and they can still do the same thing."

Contrary to the aforesaid representation to the Supreme Court of Ohio this same respondent promptly filed

a demurrer when the petitioners instituted their declaratory judgment action, and is now contending that the issue was litigated in the *Hart* and *Cook* cases.

It is stated that the records of the *Hart* and *Cook* cases were before the lower courts in the declaratory judgment and quiet title suits. These ambiguous assertions have no foundation in fact nor are they in the Record before this Court. The lower courts did not have before them or consider the records of the previous cases. The records could have been properly presented only under an affirmative plea of *res judicata* which of course was not filed since the cases below were disposed of on demurrers and motions to strike the petitioners' pleadings. If the lower courts *had* rendered their judgments upon the ground that the issue of validity had been adjudicated in the prior cases, the United States Supreme Court would hold that such action was a violation of due process in that the petitioners were not permitted to offer any proof showing that the issue of validity was not determined in the prior cases. *Postal Telegraph Cable Co. vs. City of Newport, Kentucky,* 247 U. S. 464, 475, 476; 62 L. Ed. 1215, 1220, 1221 (1918).

RESPONDENTS' CONTENTIONS WITH RESPECT TO THE NECESSITY FOR A DETERMINATION OF TITLE TO REMEDY BENEFICIARIES' POSITION OF INSECURITY AND PERIL.

The certificate holders *must* have a determination of validity or invalidity because they are the beneficial owners of real estate and the legal owners of land trust certificates whose value and marketability have been seriously affected by the doubt as to their title. They must have a determination before the liquidation of The Union Trust Company is completed, because if not, there may be a declaration of invalidity after all assets are distributed and all hope of recourse gone.

While the Successor Trustee, who has only a nominal interest in the property, may be willing to take the risk,

the petitioners who as beneficiaries are the real parties in interest, are not. The Successor Trustee continues to argue that the quiet title petition did not involve the issue of title, but only a question of income (NC-7, 11). This was in fact the basis of the decision of the Court of Appeals (QTR-77). That Court stated:

> "* * * the declaration of trust of August 15, 1924, gave The Union Trust Company some rights in respect to a part of the income and the quiet title action was brought against the Superintendent of Banks of the State of Ohio, Union Properties, Inc. and The Union Trust Company to quiet any possible claims."

It should be observed that the declaration of trust, a provision of which the Court of Appeals passed upon, was never presented to the courts either in the pleadings or in the evidence (since no evidence was presented) and that therefore the judgment of the Court is void for rendering judgment without proof.

This position of the Successor Trustee and of the Court of Appeals makes it exceedingly difficult, if at all possible, for any interested party, for example one desiring to expend $2,000,000.00 in the purchase of the property, to rely upon the decree quieting title.

The entire proceeding in the quiet title action is so replete with questionable actions of the Court that no one can rely upon the judgment reached as being a legally binding adjudication of anything. The Attorney General of the State of Ohio has pointed out in his brief, for example, that the Court completely ignored the issue of validity raised by his general denial of the allegations of petitioners' cross-petition (Atty. Gen.-9-10). Even the disclaimer of the Superintendent of Banks is of questionable validity, for if the trust were invalid the property is and always has been an asset of the bank and under the banking statutes of Ohio the Superintendent has a mandatory duty to take title and liquidate it (Ohio General Code, Section 710-95-8), and he is specifically enjoined

from abandoning or disclaiming any asset without a special application to the Common Pleas Court, with notice to all interested parties, stockholders, depositors and creditors, who have the right to participate in the hearing and to file a suit to restrain any order of abandonment (General Code of Ohio, Section 710-95-3). The quiet title decree, as has been shown, is void because the petitioners were expelled from the case leaving the Court without jurisdiction to bind them and for the other reasons set forth in our original brief.

Petitioners believe that the insecurity and peril of their position will continue until there is a judicial determination of the validity or invalidity of their title, and because they have been enjoined by the Ohio courts from seeking such a determination they can have relief only by appropriate orders of this Court.

Respectfully submitted,

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Respondents.
No. 550.

On Writ of Certiorari to the Supreme Court of Ohio.

BRIEF OF RESPONDENT, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550.

No. 549.

CARY R. ALBURN, TRUSTEE UNDER THE LAST WILL AND Testament of Charles H. Salmons, Deceased; John C. Lincoln; Helen E. Bing, Trustee of the Estate of Sol R. Bing, Deceased; and Henry George School of Social Science, a Corporation,

Petitioners,

vs.

THE UNION TRUST COMPANY, A CORPORATION, EAST 9TH Street and Euclid Avenue, Cleveland, Ohio; Paul A. Mitchell, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Union Trust Company; The National City Bank of Cleveland, Trustee Under Agreement and Declaration of Trust, Dated August 15, 1924; Union Properties, Inc., a Corporation; and Harold B. Burdick, The First Central Trust Company, Trustee Under the Deed of Trust of Frederick W. Work; Henry W. Mathews, Alice L. Scott, and Ralph Stickle, Successor Trustee Under the Will of Andrew J. Bause, Deceased,

Respondents.

No. 550.

CARY R. ALBURN, TRUSTEE UNDER THE LAST WILL AND Testament of Charles H. Salmons, Deceased; John C. Lincoln; Helen E. Bing, Trustee of the Estate of Sol R. Bing, Deceased; and Henry George School of Social Science, a Corporation,

Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, SUCCESSOR Trustee Under the Agreement and Declaration of Trust Dated August 15, 1924; H. Earl Cook, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Union Trust Company; The Union Trust Company, a Corporation; Union Properties, Inc., a Corporation; and Harold B. Burdick, The First Central Trust Company, Trustee Under the Deed of Trust of Frederick W. Work; Henry W. Mathews, Alice L. Scott, and Ralph Stickle, Successor Trustee Under the Will of Andrew J. Bause, Deceased,

Respondents.

BRIEF OF RESPONDENT, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO.

In the case of **Ulmer v. Fulton**, 129 O. S., 323, 195 N. E., 557 (1935), a bank and trust company, incorporated under the laws of Ohio, declared itself trustee of a portfolio of mortgages it then owned and sold participation certificates therein to the public. Subsequently, the bank was taken over for liquidation by the superintendent of banks and one of the holders of the mortgage participation certificates brought suit to enjoin the transfer of the trust to a successor trustee on the ground that it was invalid and that the assets of the trust belonged to the bank. The Supreme Court of Ohio held that the trust was void, that title to the mortgages allocated to the trust remained in the bank and trust company and that the participation certificate holders were creditors of the bank in the amount they paid for the mortgages.

In 1940 the Supreme Court of Ohio applied the same rule to a trust created by a bank and trust company out of land which it owned and in which it sold certificates of participation, commonly known as "land trust certificates," in Ohio. **Haggerty v. Squire**, 137 O. S., 207, 28 N. E. (2d), 554 (1940).

Various other trusts created in a similar manner out of mortgages or land owned by bank and trust companies of Ohio have been declared void and set aside by the Ohio courts. **Arend v. Fulton, Supt.**, 53 O. App., 503, 5 N. E. (2d), 792 (1936) (Mortgages); **Gallagher v. Squire, Supt.**, 57 O. App., 222, 13 N. E. (2d), 373 (1937) (Land); **Grant v. City Trust & Savings Bank**, 26 O. L. Abs., 227 (1937) (Mortgages).

The grounds upon which the Supreme Court of Ohio held such trusts void appear in the syllabus of the opinion in **Ulmer v. Fulton,** supra:

> "1. Banks and trust companies have only such powers as are expressly conferred on them by their charters and by statute, or such as may fairly be implied from those expressly given.
>
> "2. The statutes of Ohio do not authorize a bank and trust company to act in the dual capacity of settlor and trustee by creating trusts out of its own securities and selling participation certificates therein to the public.
>
> "3. Such undertakings are opposed to sound public policy and are invalid.
>
> "4. Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors.
>
> "5. The legal title to all securities which may have been allocated to such ineffective trusts remains in the bank and trust company."

In its opinion in **Ulmer v. Fulton,** supra, the Supreme Court of Ohio stated:

> "Besides, such course of conduct is so antagonistic to the fundamental conceptions of the manner in which a bank and trust company should operate and offers so many openings for abusive practices as to be opposed to sound public policy. * * *"
>
> "In the next place the acts of the bank in setting up these various purported trusts, affecting the interests of different classes of its customers, being not only beyond its granted powers but against public policy 'cannot be made good by estoppel'. There is a distinction between acts of a corporation which are invalid for all purposes and in relation to all persons, and those within the range of its general powers which are accomplished in an unauthorized manner. * * *

"* * * Hence, even where such a bank fully performs a contract unauthorized by law, it is a nullity and estoppel cannot be interposed to circumvent its invalidity. * * *"

Pursuant to the counsel of the then attorney general of Ohio, shortly after the decision in the **Ulmer** case, the superintendent of banks ordered all open bank and trust companies in Ohio to terminate such trusts, retire the certificates of participation, enter the assets of the trusts upon the books of the bank as assets thereof and recognize the certificate holders as general creditors. The superintendent's letter to the banks, dated June 17, 1935, is as follows:

"State of Ohio
Division of Banks
Columbus

June 17, 1935

"Gentlemen:

"As you are probably aware, the Supreme Court of Ohio in a decision rendered recently in case styled 'Ulmer versus Fulton, Superintendent of Banks' has held that a bank and trust company has not the legal right to create a trust out of assets which it owns and sells participations therein.

"While the case referred to is one growing out of the liquidation of a closed bank and trust company, nevertheless I recognize that the opinion as announced therein will necessitate in open banks and trust companies the retirement of certificates of participation or like instruments issued in connection with alleged trusts created out of assets belonging to such banks and trust companies as have issued the same.

"In compliance with the rule of law laid down by the Supreme Court, it will be necessary for all so-called participation trusts, created out of assets belonging to such bank or trust company, to be promptly terminated. As I understand this case,

the holders of the participation certificates or other evidence of debt, are general creditors of the bank or trust company having issued the same and the assets against which the same have been so issued are assets of said bank or trust company and must appear as such on its books, records and reports.

"If the law as determined by the Supreme Court of Ohio in the case of Ulmer versus Fulton, Superintendent of Banks, is applicable to any so-called trust in your institution, kindly see that full compliance with the law is promptly had and I will appreciate immediate advice relative to the progress being made in accordance therewith.

Yours very truly,

S. H. Squire,
Superintendent of Banks."

(QTR 30, DJR 39-40)

In addition to counseling the superintendent to compel the open banks to terminate such trusts, the attorney general, through special counsel, instituted litigation to recover the assets of any such trusts which had been transferred to successor trustees from closed banks in liquidation. Some of these suits are reported in: **State, ex rel. Squire, v. Central United National Bank, Trustee**, 20 O. L. Abs., 238; **State, ex rel. Squire, v. National City Bank, Trustee**, 24 O. L. Abs., 160; **Arend v. Fulton**, 53 O. App., 503, 5 N. E. (2d), 792; **Gallagher v. Squire**, 57 O. App., 222, 13 N. E. (2d), 373; **Grant v. City Trust & Savings Bank**, 26 O. L. Abs., 227.

With reference to the trust in this case, the superintendent of banks wrote the following letter to the successor trustee, National City Bank of Cleveland, on August 3, 1936:

"Liquidation of
The Union Trust Co.
Cleveland, Ohio

August 3, 1936.

"The National City Bank of Cleveland
Cleveland, Ohio

"Gentlemen:

"Under date of October 16, 1933, you were appointed by the Common Pleas Court of Cuyahoga County as Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, by and between The Union Trust Company and the holders of land trust certificates of equitable ownership in the premises described in a certain indenture of lease from The Union Trust Company to The Union Square Company dated June 25, 1923, and recorded in Volume 127, Pages 266-276 of Cuyahoga County Records of Leases. The case of Ulmer vs. Fulton, Superintendent of Banks, 129 O. S. 323, has raised the question as to whether or not I have an interest in said premises under the rule of law set forth in that decision, and there is also the question as to what, if any, my interest is under the terms of said Agreement and Declaration of Trust dated August 15, 1924. Neither my interest in said Citizens Building property, if any, nor the rights of the holders of certificates of equitable ownership issued under said Agreement and Declaration of Trust dated August 15, 1924, have as yet been determined. Until such times as such rights and interests are determined, it is mutually to our advantage that the value of said premises be maintained and that as much income as possible shall be derived therefrom.

"Accordingly, I hereby agree that until such rights and interests are determined, The National City Bank of Cleveland in its capacity as Successor-Trustee under said Agreement and Declaration of Trust dated August 15, 1924, may take such steps and perform such acts as it, in its discretion, may deem advisable to preserve or enhance the value of said Citizens Building property or to obtain income

therefrom, including, if such steps seem advisable, the termination of said lease of June 25, 1923, hereinabove referred to, and the taking of possession of said property, and including the making, ratification or consent to leases or modifications of leases of said premises or portions thereof for a term of three years or less, and such leases or modifications of leases for a term of more than three years, the terms of which I shall hereafter approve in writing, and including such steps and acts incidental to the management of said property, it being understood between us that the taking of such steps and the doing of such acts shall be without prejudice to the rights of the undersigned or of any holder of a land trust certificate of equitable ownership issued under said Agreement and Declaration of Trust dated August 15, 1924, or of The National City Bank of Cleveland in its capacity as such Successor Trustee or otherwise.

"It is further understood that in the event it is finally determined this parcel of real estate is an asset of The Union Trust Company, I will honor all leases by you as Successor Trustee covering a term of three years or less and those covering a term of more than three years, which I shall hereafter in writing approve.

Very truly yours,
S. H. Squire,
Superintendent of Banks of the State of Ohio, in charge of the Liquidation of The Union Trust Company.

By G. H. Robertson,
Special Deputy Supt. of Banks."
(QTR 31-32, DJR 40-41)

The validity or invalidity of this trust and the ownership of the assets of the trust have never been determined. As the Common Pleas Court stated in its opinion in the declaratory judgment action:

"It is unquestionably true that the validity of the trust under consideration in this case has never

been passed upon on its merits by any court." (DJR 71)

In the quiet title suit brought by the successor trustee, the trustee represented to the court that the validity of the trust was not involved, that it did not seek a determination of validity and that the action was brought only to determine a possible right to a part of the income of the property that The Union Trust Company might have under the terms of the declaration of trust (QTR 72). The Court of Appeals stated in its opinion that it was not ruling upon the issue of validity:

> "With respect to the quiet title action, the Declaration of Trust of August 15, 1924, gave the Union Trust Company some rights in respect to a part of the income of the property and the quiet title action was brought against the Superintendent of Banks of Ohio, Union Properties, Inc., and the Union Trust Company to quiet any possible claims. Nothing in the petition to quiet title can be found requiring any adjudication of the validity of the trust." (QTR 77)

The superintendent of banks is a public official in whom is reposed the duty to enforce the banking laws of the state of Ohio and the public policy of the state. His duty, in cases such as these, was well stated by the Court of Appeals in its opinion in **Arend v. Fulton,** 53 O. App., 503, 5 N. E. (2d), 792 (1936). In this case, the bank which created the trust being in liquidation, a certificate holder filed suit to have a successor trustee appointed. The superintendent of banks opposed the petition, denying the validity of the trust and asserting that the assets thereof should remain in the bank. The beneficiaries sought to distinguish the case from the **Ulmer** case on the ground that in the **Ulmer** case the superintendent of banks upheld the validity of the trust and

beneficiaries attacked it, whereas in the **Arend** case beneficiaries upheld the validity of the trust and the superintendent attacked it. Commenting upon this argument, the court said:

> "* * * And if such a trust be invalid as against public policy, it is difficult to conceive why its validity or invalidity should be determined and controlled by the desire of a certificate holder, or by the changing position of the Superintendent of Banks, who represents not himself as an individual, nor the state as such, but acts as a liquidating agent to possess and preserve the property and assets of the bank for the benefit of its depositors. * * *"

In the quiet title suit, therefore, the attorney general, believing that it was the duty of the superintendent of banks not to avoid a determination of the issue of validity, squarely raised that issue. While all of the other parties demurred to the cross-petition of the Alburn group of beneficiaries, the petitioners in this court, the superintendent of banks filed an answer, in substance a general denial, and, in addition, alleged in this answer:

> "These defendants being public officials take no position with reference to the validity or invalidity of the trust in question, considering that to be the duty of the Court after full consideration of the facts and the law * * *" (QTR 41)

The superintendent of banks did not pray for a dismissal of the cross-petition but asked the court to protect his interests in any order made upon the issues joined by his answer (QTR 41). The court failed to consider the validity of the trust. There was no consideration of the facts whatsoever, no evidence having been introduced. Moreover, the court completely ignored the superintendent of banks' answer to the cross-petition and

proceeded to final judgment without ruling upon the issues made up by the cross-petition and general denial. Nowhere in the decree quieting title is there any reference to the disposition of this issue (QTR 6-11).

While the special counsel acting for the then attorney general thus filed an answer to the petitioners' cross-petition in the quiet title suit, he filed a demurrer to the petitioners' petition in the declaratory judgment action (DJR 27), apparently believing that the quiet title suit was a better vehicle for the determination of the issue than was the declaratory judgment suit.

In the quiet title decree, the court has enjoined the superintendent of banks, as well as other parties, from setting up any claim to the property adverse to the title and possession of the successor trustee (QTR 11). This injunction will prevent a determination of the issue of validity by any of these parties, although it is necessary that this issue be decided before The Union Trust Company is completely liquidated, for, if the trust is declared invalid, the property is an asset of the bank.

Furthermore, if this trust is invalid, the transaction was in contravention of the public policy of the state of Ohio as laid down by the Supreme Court of Ohio in the **Ulmer** and **Haggerty** cases, and it would be the duty of the attorney general to take cognizance of the matter and to take such action as may be required for enforcing the public policy of the state.

In the long course of this litigation there have been various special counsel assisting different attorneys general of the state of Ohio and it appears, from our review of the matter, that, at times, varying positions have been taken by them. The simple result, however, of the conflict between the main contestants is that there has

been no judicial determination of the validity or invalidity of the trust and that such a determination is necessary to clear the title to the property and to terminate the liquidation of The Union Trust Company without leaving undetermined the disposition of a possible asset of substantial value. Since the injunction issued by the Common Pleas Court and affirmed by the higher courts prevents any other solution of this matter, we believe that the only available remedy now lies in the hands of this court.

We think that valid reasons have been presented to this court for the exercise of its jurisdiction and hope that it sees fit to consider the matter upon its merits.

Respectfully submitted,

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Attorneys for the Superintendent of Banks of the State of Ohio.

Of Counsel:
WILLIAM C. BRYANT,
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FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1948.

Supreme Court, U.
FILED
MAR 11 1949
CHARLES ELMORE CROPLE
CLERK

No. 549 and No. 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, et al.,
Respondents.
No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc. et al.,
Respondents.
No. 550.

BRIEF OF RESPONDENT, UNION PROPERTIES, INC., OPPOSING PETITION FOR WRITS OF CERTIORARI.

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March 11, 1949.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

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TABLE OF ABBREVIATIONS.

Burdick, *et al.*	Intervening defendants in both cases who are owners of Land Trust Certificates and intervened to insist that Petitioners were not representing the true interest of the Certificate Holders.
Certificate Holders	Owners of Certificates of Equitable Interest in Citizens Building Property under Land Trust created August 15, 1924.
DJR	Refers to pages of record in Declaratory Judgment case (case No. 549).
Duffy Br.	Refers to pages of brief of Ohio Attorney General.
Hart Rec. I .....; II	Refers to pages or volumes I and II of record in Supreme Court of Ohio in *Stanley, et al. v. Hart,* 142 O. S. 528.
Pet.	Refers to pages of Petition for Writs of Certiorari and supporting brief.
Petitioners	Refers to Petitioners in both cases in this Court, Cary R. Alburn, *et al.*
QTR	Refers to pages of record in Quiet Title case (case No. 550).
Respondents	Refers to all Respondents in both cases in this Court. All Respondents were defendants in both cases below, except The National City Bank of Cleveland, Successor Trustee, plaintiff in the Quiet Title case and defendant in the Declaratory Judgment case.
Trustee	The National City Bank of Cleveland, Successor Trustee of Land Trust Certificate issue since 1933, defendant in Declaratory Judgment case and plaintiff in Quiet Title case.

In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, *et al.*,

Petitioners,

vs.

THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, *et al.*,

Respondents.

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CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, *et al.*,

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THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc. *et al.*,

Respondents.

No. 550.

BRIEF OF RESPONDENT, UNION PROPERTIES, INC., OPPOSING PETITION FOR WRITS OF CERTIORARI.

INTRODUCTION.

Following the commendable practice adopted by Petitioners we shall file this one brief opposing the joint petition for writs of certiorari in these two cases.

There are no Federal questions involved in these cases and the decisions of the lower Courts are clearly right. As

pointed out by the Court of Appeals (QTR 77, 80-81; DJR 87, 90), Petitioners are merely attempting to relitigate in these two cases issues which have been "definitely and irrevocably" determined against them by the Supreme Court of Ohio in *Stanley v. Hart*, 142 O. S. 528 (1944) and in *State ex rel. Stanley v. Cook*, 146 O. S. 348 (1946). For convenience these cases will be hereafter referred to as the "*Hart* case" and the "*Cook* case" respectively.

A. PROCEEDINGS BELOW.

Petitioners' entire case is predicated upon the assertion that they were not accorded a hearing in the Courts below, particularly in the Quiet Title case. Thus they say (Pet. 7):

> "The Common Pleas Court sustained demurrers to all of the petitioners' pleadings in both cases asking for affirmative relief and at the same time struck from the files the answer of the petitioners in the Quiet Title suit (QTR 10). It then issued a decree *pro confesso* quieting title in the Successor Trustee (QTR 6-11). No evidence was adduced. Although expelling the petitioners, who were beneficiaries of the trust, from the case and denying them a hearing, the court did not expel the other beneficiaries, who had taken a position contrary to that of the petitioners, and permitted them to participate in the hearing on the merits (QTR 6-11)."

It is true that no evidence was adduced, since the cases were disposed of on demurrers, but it is not true that the Court expelled the Petitioners from the case or "issued a decree *pro confesso.*" On the contrary, in the Quiet Title case as in the Declaratory Judgment case, Petitioners were accorded a full and complete hearing both on briefs and oral argument *as to the merits* of the case made by their pleadings, *and were accorded an opportunity to plead further* when the Court held their pleadings in-

sufficient as a matter of law. Thus, Petitioners were given a full opportunity to improve their case (QTR 10, lines 17-20; DJR 5, lines 3-6). As a matter of fact the Petitioners received exactly the same treatment at the hands of the Court that the other beneficiaries received, that is the title of the Trustee was quieted for the benefit of all the beneficiaries including the Petitioners.

Petitioners' case rests upon the proposition that a party, whose pleadings have been found insufficient as a matter of law after a full hearing—either on demurrer or on motion to strike—, and who was accorded a full opportunity to amend such pleadings, has been denied his day in Court. Nothing could be more absurd.

1. Petitioners Were Accorded a Full and Fair Hearing Below.

The fact that Petitioners were accorded a full hearing in both cases as to the merits of the case made by their pleadings, and an opportunity to amend after the pleadings were held insufficient, is shown by the following brief summary of events from the record. (All References in this first summary are to the Record in Case 550, QTR.)

Common Pleas Court.

1946

June 8. Petition to Quiet Title filed by The National City Bank, Successor Trustee (1, 18).

July 5. Answers of the Superintendent of Banks, The Union Trust Company, and Union Properties, Inc. filed disclaiming any interest in Trust property (1, 23-24).

July 5. Motion by Cary R. Alburn, Trustee, *et al.* (present Petitioners) to intervene granted (1, 21-3).

July 10. Joint answer and cross-petition of Petitioners filed (1, 25-33).

October 26. Demurrers and motions to strike attacking Petitioners' answer and cross-petition filed by Respondents[1] (3, 4, 42-47).

December 16. Brief of Petitioners filed (4).

1947

April 7-10. Four days of oral argument as to merits of Petitioners' pleadings in both cases.[2]

April 10. Motion of Harold B. Burdick, *et al.*, Certificate Holders, who opposed Petitioners' position, for leave to become parties defendant filed (4, 49).

April 25. Petitioners filed objections to motion of Burdick, *et al.*, to be made parties defendant (4).

May 7. Petitioners filed supplemental brief (4).

June 10. Petitioners filed additional brief (4).

June 10. Petitioners filed brief opposing amended motion to intervene (4).

December 22. Petitioners allowed to amend cross-petition to insert references to *Hart* case and *Cook* case (5-6).

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[1] All respondents, except the Superintendent of Banks, filed demurrers or motions to strike, or both, addressed to the answer and cross-petition of the petitioners (QTR 3, 4, 42-7, 50). The Superintendent of Banks filed an answer in which he set forth (a) the five cases previously brought by petitioners, and (b) the adjudications in the *Hart* and *Cook* cases, and the effect thereof, and pointed out (QTR 41):

> "• • • that the certificate holders will be deprived of their property if the trust is held invalid since the Supreme Court of Ohio in the *Stanley* case (mandamus) forever barred the certificate holders from being claimants or creditors of said The Union Trust Company."

No reply was filed to this answer (QTR 3-4), and all its allegations stand admitted on the record (Ohio General Code 11326, 11346).

[2] The docket entries printed in the record do not disclose the fact of oral arguments in the Common Pleas Court, the Court of Appeals or the Supreme Court, but there is, of course, no dispute that they occurred.

1948

January 29. Petitioners filed answer to memorandum regarding injunction provision in Quiet Title decree (6).

February 10. Order sustaining demurrers to Petitioners' cross-petition, granting motions to strike Petitioners' answer and quieting title in The National City Bank as Trustee for Certificate Holders (6-11); this order includes the following:

p. 7, lines 1 to 10. Recitation by Court that joint answer and cross-petition of Petitioners is being passed on.

p. 8, Par. 3. Finding that Petitioners have no interest in property except as owners of Land Trust Certificates.

pp. 8-9, Pars. 4-6. Finding that other defendants have no interest in property except as owners of Land Trust Certificates.

p. 9, Par. 7. Finding that it is to the best interest of all parties that title be quieted.

pp. 9-10. Demurrers to cross-petition and motions to strike answer of Petitioners are sustained. Petitioners (Cary R. Alburn, Trustee, *et al.*) "*not desiring to plead further either by way of answer or cross-petition,*[3] said cross-petition is hereby dismissed and judgment is hereby rendered for the plaintiff against said intervening defendants."

Court of Appeals.

1948

February 16. Case docketed (12).

March 15. Brief of Petitioners filed (12).

March 26. Briefs of Respondents filed (12).

April 5. Petitioners' reply brief filed (12).

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[3] Emphasis appearing in quotations throughout this brief is ours unless otherwise noted.

April 7. Oral argument in Court of Appeals for a full day.

June 1. Opinion of Court of Appeals filed affirming judgment of Common Pleas Court (76-81).

June 11. Order entered affirming judgment of Common Pleas Court (12-13).

Supreme Court of Ohio.

1948

June 30. Notice of appeal filed (15, 62).

July 8. Petitioners' motion to certify and brief filed (15, 64).

August 28-September 1. Briefs of Respondents filed (15).

August 31. Motion by Respondents to dismiss appeal as of right filed (15, 69).

October 8. Petitioners' reply brief filed (15).

October 14. Oral argument in Supreme Court.

October 20. Motion to certify denied. Motion to dismiss appeal as of right granted (16).

November 2. Petitioners' application for rehearing filed (16).

November 10. Rehearing denied (16, 70-75).

The Record in Case 549, DJR.

Substantially the same sequence of hearings and rulings occurred in the Declaratory Judgment case (See DJR 1-9, 26-7, 34-44, 60-82, 86-91).

2. Petitioners' Pleadings Referred Specifically to the Prior Actions Between Same Parties On the Same Subject Matter.

Before the demurrers and motions to strike, addressed to Petitioners' original petition in the Declaratory Judgment case and to their answer and intervening cross-petition in the Quiet Title case, had been ruled upon, Peti-

tioners amended their petition and intervening cross-petition by inserting two paragraphs which appear in the entries of December 22, 1947 (DJR 3-4; QTR 5-6). These paragraphs refer to the prior actions between the same parties dealing with the same subject matter, specifically to the cases of *Stanley v. Hart*, 142 O. S. 528 (1944), and *State ex rel. Stanley v. Cook, Superintendent of Banks*, 146 O. S. 348 (1946). These allegations show that each of the previous suits was brought by some of the present Petitioners "on behalf of all certificate holders," and that both suits related to the same subject matter and the same "agreement and declaration of trust described in this petition (cross-petition)."

The effect of these allegations was to bring before the trial court, and of course each reviewing court, the previous litigation between these parties upon the same subject matter and to make available to those Courts on Respondents' demurrers and motions to strike the records and holdings in those previous cases.

This single fact in the proceedings below was of vital significance because it enabled the Court to have before it the prior adjudications and the records of those adjudications, together with Petitioners' admission that such litigation was between the same parties as to the same subject matter.

B. THE FACTS.

The facts are not fully or accurately set forth by Petitioners (Pet. 2-8) but in view of the previous adjudications between the parties and the limited grounds upon which Petitioners seek or could be entitled to the issuance of a writ, a detailed review of the facts is unnecessary.

One fact has been so consistently and persistently misstated throughout this long litigation that it deserves passing attention. Petitioners assert that The Union Trust Company derived a profit in excess of $1,695,000 from the sale of the Land Trust Certificates (Pet. 2-3). Petitioners

fail to state, however, that they arrive at this conclusion—it is of course merely a conclusion—by comparing the original cost of the *vacant* property in 1901—$310,000—(DJR 61; Pet. 2) with the price which was received for the certificates in 1924, 23 years later, after a 14-story office building had been erected upon the property. (Hart Rec. I-467.) It is, of course, absurd to suggest that the bank derived any such profit from the sale of the certificates under such circumstances.

ARGUMENT.

The two cases here presented are the sixth and seventh cases between the parties over the last eight years regarding this subject matter. Different phases of this matter have been presented on oral arguments to the Supreme Court of Ohio nine different times in the last six years. We shall not review this litigation in detail but it is important to bear in mind the second and fifth cases brought by Petitioners' counsel because (a) both of them were specifically referred to in Petitioners' pleadings in the instant cases (DJR 3-4; QTR 5-6), (b) both of them were decided by the Supreme Court of Ohio, and (c) the records of both cases were before the Supreme Court of Ohio under the Ohio Rule as to judicial notice of prior litigation between the same parties on the same subject matter.[4] The five cases referred to are described in the answer of the Superintendent of Banks to the cross-petition of Petitioners (QTR 39-41). We mention only the second and fifth cases.

(2) In *Stanley, et al. v. Hart*, 142 O. S. 528 (1944), Common Pleas Court, Cuyahoga County, No. 515,986; Court of Appeals, No. 19,058; Supreme Court No. 29,520 (the *Hart* case), plaintiffs, some of the present Petitioners, suing on behalf of all Certificate Holders, sought to set

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[4] For discussion of Ohio Rule as to judicial notice on this subject see *infra*, pp. 10-12.

aside the Citizens Building land trust and to have claims allowed against The Union Trust Company in liquidation for the amount of the total certificate issue. This relief was denied by the trial court on the ground that plaintiffs had failed to file a claim in the liquidation proceeding within the time limited by Section 710-92a of the Ohio General Code (the McIntyre Act[5]), 29 Ohio Opinions 35 (1942). This case was heard *de novo* in the Court of Appeals on the same record and that Court held unanimously that the Certificate Holders were not entitled to any claim against The Union Trust Company in liquidation. (Hart Rec. I-129, 130.) This judgment was later affirmed by the Ohio Supreme Court without opinion by an equally divided Court. 142 O. S. 528 (1944).

(5) *State ex rel. Stanley, et al. v. Cook, Superintendent of Banks, et al.*, No. 30,007, 146 Ohio St. 348 (the *Cook* case), was an original action in mandamus in the Ohio Supreme Court to compel the Superintendent of Banks to treat the Citizens Building land trust as void. This action was brought by the same parties as relators who had been plaintiffs or intervening plaintiffs in the *Hart* case. The Supreme Court rendered final judgment for the defendant Superintendent of Banks in that case, and held (p. 366):

> "The effect of the *Hart case was to deprive the relators permanently of any standing, either legal or equitable, as creditors of The Union Trust Company on account of their holdings of such trust certificates.* * * *"

and again (p. 371):

> "* * * it was held definitely and irrevocably in the *Hart case* that no certificate holder of the class represented by relators here was (or is) entitled to the status of a creditor of The Union Trust Company. * * *"

---

[5] The McIntyre Act is printed as Appendix A to the petition (Pet. 31).

The Court specifically held that the Superintendent of Banks had no duty to compel the observance of the law generally or to enforce the public policy of the State. See paragraph 7 of syllabus, and pages 375-6.

Thus it was affirmatively established in the *Hart* case and specifically and emphatically recognized by the Ohio Supreme Court in the *Cook* case that the Certificate Holders, including the Petitioners and all the other Certificate Holders, are forever barred and deprived from participating "as creditors of The Union Trust Company on account of their holdings of such trust certificates." This holding of the Supreme Court, brought before the Common Pleas Court by Petitioners' allegations with respect to these two previous cases, was in large measure the foundation of the decision of the courts below.

I. THE RULE IS FIRMLY ESTABLISHED IN OHIO THAT A COURT WILL TAKE JUDICIAL NOTICE OF THE RECORD AND PROCEEDINGS IN A CASE PREVIOUSLY BEFORE IT INVOLVING THE SAME SUBJECT MATTER AND PARTIES.

It is the clearly established law of Ohio that a Court will take judicial notice of the record and proceedings in a case previously before it involving the same subject matter and parties.

Hughes v. Bd. of Revision, 143 Ohio St. 559, 560; 56 N. E. 2d 63, 64 (1944);

Klick v. Snavely, 119 Ohio St. 308, 309; 164 N. E. 233, 234 (1928);

State, ex rel. Gaede v. Guion, 117 Ohio St. 327, 328; 158 N. E. 748 (1927);

State, ex rel. Galloway v. Industrial Commission, 115 Ohio St. 490, 492; 154 N. E. 736 (1926);

Cook v. The Guardian Trust Company et al., 43 O. Abs. 318, 320; 62 N. E. 2d 291, 292-3 (Ct. of App. Cuyahoga County 1945).

In the *Hughes* case just cited the Supreme Court said (143 O. S. 560):

> "* * * This court will take judicial notice of the record in a case previously before it, involving the same subject matter and party. * * *"

The Court will recall that prior to the ruling on the demurrers and the motions to strike in the Common Pleas Court Petitioners had amended their pleadings in both cases by referring specifically to the *Hart* case and the *Cook* case and reciting that those cases had been brought by "some of the plaintiffs (defendant cross-petitioners) herein on behalf of all certificate holders" and that both suits related to the same subject matter and the same "agreement and declaration of trust described in this petition (cross-petition)." (*supra*, pp. 6-7; DJR 3-4; QTR 5-6.) In view of these allegations—making it clear by Petitioners' admission that the prior adjudications had been between the same parties and upon the same subject matter—the Courts in ruling upon the demurrers and motions to strike had before them as a matter of judicial knowledge all the records and proceedings of the two prior cases in the Supreme Court to which reference was specifically made by Petitioners.

With those records and decisions before the Court it was inevitable that the Court should reach the conclusion that the only real issues involved in the case had been previously adjudicated against the Petitioners and that there was no occasion to adjudicate them again. Thus the Court of Appeals, in affirming the action of the Common Pleas Court which had sustained the demurrers and the motions to strike, said (DJR 87; QTR 77):

> "We reach this conclusion primarily because it is our opinion that the questions here presented have heretofore been fully litigated and determined in the cases of *Stanley et al., vs. Hart*, Common Pleas Court of Cuyahoga County Case No. 515,986, Court of Appeals No. 19,058, 142 O. S. 528, and in the case of

> *State ex rel. Stanley v. Cook, Supt. of Banks etc. et al.*, an original action in mandamus in the Supreme Court of Ohio, 146 O. S. 348."

and again (DJR 90; QTR 80-81):

> "It is also our view that in these cases plaintiff's petition in the declaratory judgment case and the cross-petition in the quiet title case constitute an attempt to secure the overruling of the decision in the *Hart* case."

Thus it is clear that the Ohio Courts had before them the prior adjudications between the same parties upon the same subject matter which had been specifically pleaded by Petitioners in their amendments of December 22, 1947, and relied upon those previous adjudications between the parties in holding that Petitioners' pleadings disclosed no cause of action in the Declaratory Judgment case and no defense or cross-claim in the Quiet Title case.

II. IN VIEW OF THE ESTABLISHED FACT THAT PETITIONERS HAD A FULL AND FAIR HEARING IN THE COURTS BELOW, NO FEDERAL QUESTION IS PRESENTED AS A BASIS FOR ALLOWANCE OF THE WRITS.

Petitioners have presented four reasons for allowance of the writs and each of them is wholly devoid of substance. Each of the reasons is based upon the wholly false assumption that a party whose rights are adjudicated by sustaining a demurrer or motion to strike—thus determining that his pleadings present no cause of action or no defense—has been denied a hearing. As we have already seen (*supra*, pp. 3-6) Petitioners were allowed to file briefs supporting their pleadings and to present their arguments orally in both cases in all three Courts below, and in both cases the Courts decided that the pleadings were inadequate and stated no cause of action in the Declaratory Judgment case and stated no defense or no valid cross-claim in the Quiet Title proceedings. Let us examine the four reasons advanced by Petitioners and the cases cited in support thereof.

A. The First Reason.

Three case are cited in support of the first reason (Pet. 13). The first two cases deal with forfeitures of land from citizens of Virginia during the war between the States and merely hold that where the land owner's answer was stricken bodily from the record and he was allowed no opportunity to defend that there was no valid proceeding. In the third case it was held that striking a defendant's answer because he was guilty of contempt and refusing to allow him to defend was a failure of due process.

No such situation was presented by the cases at bar. Petitioners' pleadings are part of the record, are here presented, and were held to be wholly inadequate by the lower Courts in that they stated no cause of action or no defense. In ruling upon the merits of Petitioners' case as presented by their pleadings the lower Courts did exactly what Courts do every day in ruling upon demurrers or other questions arising upon pleadings.

B. The Second Reason.

Petitioners' second reason (Pet. 13) is equally fallacious and based again upon the false assumption that they were not accorded a hearing. The cases cited have no tendency to support the contention here made. In *Hansberry v. Lee*, 311 U. S. 32 (1940), this Court merely held that a prior adjudication between different parties was not binding upon the current litigants since the prior case was not a true class suit, did not even purport to be, and did not relate to any common property or contract interest.

In *McArthur v. Scott*, 113 U. S. 340 (1885) this Court merely held that a decree setting aside a will in a will contest proceeding in Ohio to which no executors or trustees were parties (p. 396) and which gave every appearance of being a collusive proceeding (p. 394) was not binding on after-born beneficiaries of the trust who were not made

parties or represented in any way under the doctrine of virtual representation.

Smith v. Swormstedt, 57 U. S. 288 (1853) involved the property rights in the Methodist Book Concern resulting from the split between the Methodist Episcopal Church South and the Methodist Episcopal Church North. The Court held that the commissioners acting for the Methodist Episcopal Church South were properly qualified and could maintain a representative suit. No constitutional question was presented.

C. The Third Reason.

Petitioners' third reason (Pet. 13) is again based upon the wholly false assumption that no hearing was accorded them below. We have already referred to the three cases cited in support of this reason and they have no application to a situation such as that presented in the case at bar where the parties were accorded full hearing upon the merits of the case made by their pleadings and were offered an opportunity to amend their pleadings and declined to do so (*supra*, pp. 3, 5; DJR 5, lines 3-6; QTR 10, lines 17-20).

D. The Fourth Reason.

The cases cited in support of Petitioners' fourth reason (Pet. 13) do not have even a remote resemblance to the situation here presented.

In *Marino v. Ragen*, 332 U. S. 561 (1947), a boy of 18 who did not understand English was convicted of murder on a plea of guilty, although he had no lawyer and the arresting officer acted as interpreter. The Attorney General of Illinois admitted that the writ of habeas corpus should have been granted and the judgment below was accordingly reversed.

In *Brinkerhoff-Faris Company v. Hill*, 281 U. S. 673 (1930), plaintiff sued to enjoin a discriminatory applica-

tion of the Missouri tax law. The Missouri Court dismissed the suit on the ground that plaintiff should have exhausted his remedy before the Tax Commission. The Missouri Courts had theretofore consistently held that there was no remedy before the Tax Commission. The case was remanded to the Missouri Court to determine whether plaintiff's claim raised a question under the equal protection clause of the Constitution, and the Missouri Supreme Court reversed itself and enjoined the discriminatory part of the tax (42 S. W. 2d 23).

In *Lee Van Woods v. Nierstheimer*, 328 U. S. 211 (1946), the Illinois Court had denied a writ of habeas corpus on the ground that it was not the proper remedy under the Illinois procedure but that a writ of error *coram nobis* was the proper remedy. This Court held that the question as to the appropriate remedy was merely one of State law and the writ of certiorari was dismissed.

There is no doubt that the Petitioners herein had an adequate remedy at law if they had not delayed until long after their claim had been barred by the provisions of the McIntyre Act (Pet. 31) fixing a time limit for filing claims against banks in liquidation. Thus in disposing of Petitioners' contention that they did not have a plain and adequate remedy at law and were therefore entitled to a writ of mandamus, the Supreme Court of Ohio stated (146 O. S. 348, 373):

> "In the *Hart* case relators here had a plain and adequate remedy in the ordinary course of the law authorized by Section 710-92 and Section 710-95, General Code. They lost there not because the action was not properly brought but because their claims had not been filed within the time limited by law.
>
> "The Banking Act (Section 710-89 *et seq.*, General Code) provides a plain and adequate procedure for the liquidation of banks and the determination of all claims arising in the course of such liquidation. * * *."

A Statute of Limitations or of non-claim may frequently deprive a claimant of all rights if suit is not brought within the designated period. This does not mean that a party has been illegally or unconstitutionally deprived of his rights.

> *Terry v. Anderson,* 95 U. S. (5 Otto) 628, 633 (1877); *Smith v. New York Central Rd. Company,* 122 O. S. 45, 49 (1930).

No such hardship is imposed upon the Petitioners here. They still retain the trust property which they have enjoyed continuously for more than twenty-four years and no one except the Petitioners themselves, their counsel and those who have been associated with them from time to time in this litigation has ever suggested any doubt as to their right to retain the property and enjoy it forever.

Obviously, parties who are afforded an adequate remedy and lose it because of their own laches or delay cannot complain that they have been denied due process.

III. THE BRIEF OF THE OHIO ATTORNEY GENERAL SUGGESTS NO REASONS FOR GRANTING THE WRITS.

A most remarkable situation is here presented. After almost eight years of litigation (QTR 39-40), covering the administration of four Superintendents of Banks and two Attorneys General of Ohio,[6] during all of which period these public officials have consistently opposed the contentions of Petitioners and their counsel, the new Attorney General who took office on January 10, 1949 has filed a brief supporting Petitioners' request that this Court grant the writs.

On September 1, 1948 Paul A. Mitchell, then and now Superintendent of Banks of the State of Ohio, acting by

---

[6] The Superintendents of Banks have been Rodney P. Lien until January 15, 1942, William L. Hart until October 19, 1943, H. Earl Cook until May 1, 1947 and Paul A. Mitchell since that time. The Attorneys General have been Hon. Thomas J. Herbert 1941-44; Hon. Hugh S. Jenkins 1945-48.

the Ohio Attorney General, filed a brief in the Supreme Court of Ohio in the two cases at bar in which he urged:

1. That the motions to certify be denied.

2. That "no substantial constitutional questions are presented and that the appeals as of right should be dismissed in both cases."

We have no reason to suppose that Mr. Mitchell, who is still Superintendent of Banks, has in any way changed his position.

There is no suggestion in the Attorney General's brief that any Federal question is here presented. Assuming, as we should, that the Attorney General knows that this Court's jurisdiction to review is limited to such questions, this omission is particularly significant. As a matter of fact, the Attorney General's brief is merely a rehash of arguments which the Petitioners and their counsel have been presenting over a period of almost eight years and of which the Ohio Supreme Court has completely disposed. It is, for example, contended (Duffy Br. 8) that the Superintendent of Banks is charged with a duty of enforcing "the public policy of the State." This was precisely the basis of the Petitioners' argument when they sought a writ of mandamus in *State ex rel. v. Cook*, 146 O. S. 348, and the Ohio Supreme Court emphatically denied this contention, see paragraph 7 of syllabus and pages 375-6.

In an attempt to show some previous inconsistencies in the positions taken by the Superintendent of Banks, the Attorney General quotes a part of one sentence from the Superintendent's answer to Petitioners' cross-petition in the Quiet Title case (Duffy Br. 9). It is significant to observe however (1) that the Superintendent had previously filed an answer in the Quiet Title case disclaiming any right to or interest in the trust property (QTR 1, 24), (2) that the sentence, of which the Attorney General quoted a part, concluded as follows (QTR 41):

"* * *, but they do consider it to be their duty to respectfully suggest to the Court that the certificate holders will be deprived of their property if the trust is held invalid since the Supreme Court of Ohio in the Stanley case (mandamus) forever barred the certificate holders from being claimants or creditors of said The Union Trust Company."

The argument of the Attorney General (Duffy Br. 11) that "a determination is necessary to clear the title to the property and to terminate the liquidation of The Union Trust Company * * *" is wholly without substance. The disclaimer of any right, claim or interest in the property by the Superintendent of Banks, the decision of the Ohio Supreme Court in the *Hart* and *Cook* cases and the decree in the Quiet Title case quieting the title of The National City Bank as Successor Trustee against any claims of the Superintendent of Banks or Union Properties, Inc. make it clear that a determination of the academic question as to the original validity of the trust is neither necessary nor proper.

It is, of course, clear that no questions are here involved as to the soundness of the decision below as a matter of State law.

Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157, 165-6 (1917).
American Railway Express Company v. Kentucky, 273 U. S. 269, 272-3 (1927).

However, in view of the position taken by the Attorney General we shall address ourselves briefly to the soundness of the decisions below.

A. The Decisions of the Lower Court Were Sound and Just Under the State Law.

By their petition in the Declaratory Judgment case and their cross-petition in the Quiet Title case Petitioners sought to have determined the wholly academic question whether the trust created in 1924 was originally valid.

The Court determined in the Quiet Title proceeding that the trust is not now subject to attack by any party to this litigation, and quieted the title of the Trustee for the benefit of the Certificate Holders, including the Petitioners. In so doing the Court pointed out that Petitioners were merely trying to relitigate the questions which had been determined against them in the prior litigation (DJR 87, 90; QTR 77, 80-81).

The fact is moreover that Petitioners did not present any facts in either case which stated a cause of action.

B. The Declaratory Judgment Case (No. 549).

The petition in the Declaratory Judgment case was defective both because it showed that Petitioners were merely trying to relitigate the questions determined in the prior litigation between the same parties as to the same subject matter, and because they failed to state any justiciable question in that they took no position as to the validity or invalidity of the trust (DJR 19). The law is firmly established in Ohio, as elsewhere, that relief may be had by Declaratory Judgment only when "a real controversy between adverse parties exists which is justiciable in character and speedy relief is necessary to the preservation of rights that may be otherwise impaired or lost."

Schaefer v. First National Bank, 134 O. S. 511, 18 N. E. (2d) 263 (1938);

Driskill v. City of Cincinnati, et al., 66 O. App. 372, (Hamilton County, 1940);

Eccles v. Peoples Bank, 333 U. S. 426 (March 15, 1948);

Liberty Warehouse Co., et al. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282 (1927);

Humble Oil & Refining Co. v. State Mineral Board, et al., 32 F. Supp. 45 (D. C., W. D. Louisiana, 1940);

Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929).

In view of this well established rule and Petitioners' failure to take any position as to the validity of the trust (DJR 19) the lower Courts had no alternative but to dismiss the petition and to render final judgment upon Petitioners' refusal to plead further.

C. The Quiet Title Proceeding (No. 550).

The decree of the trial Court in the Quiet Title case (a statutory proceeding, Ohio G. C. 11901) quiets the title to the trust property in The National City Bank as Trustee for all of the Certificate Holders, including Petitioners, and enjoins all parties from interfering with the title and possession of the Successor Trustee (QTR 10-11). Thus all Certificate Holders, including Petitioners, are conclusively protected against any possible interference with the trust property.

The cross-petition of the Petitioners did not assert any interest in the property. On the contrary, the very foundation of their position throughout this litigation has been that they had *no* interest in the property. Petitioners did assert that the title to the property should properly be in the Superintendent of Banks because of the original invalidity of the Trust. Thus, Petitioners were attempting to relitigate the issues decided in the *Hart* and *Cook* cases and to set up as a defense in a quiet title proceeding, a title in some third party (the Superintendent) with whom they claimed no privity. It has been settled in Ohio for more than 80 years that a defendant in a quiet title proceeding cannot attack the plaintiff's title on the ground that some third party, with whom such defendant is not in privity, has a title superior to plaintiff's.

In *McKinzie v. Perrill*, 15 O. S. 162 (1864), it was expressly held that a defendant in a quiet title proceeding could not set up a countervailing equity in a third person with whom he was not in privity. Thus, the court said (169):

> "* * * But, waiving all other questions as to the competency of this proof, it seems to us that the defendant, Perrill, can not be allowed thus to set up a countervailing equity in third persons, with whom he is not in privity, and who, being parties to the suit, by their silence disclaim for themselves, and in the plaintiff's favor, the title, which he, a stranger, seeks to thrust upon them."

In view of Petitioners' failure to claim any interest in the property the Courts below had no alternative but to rule a pleading deficient which asserted no rights in the subject matter of the action.

CONCLUSION.

We respectfully submit that no Federal questions are presented and that the writs of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
Union Properties, Inc.

BAKER, HOSTETLER & PATTERSON,
Of Counsel.

March 11, 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, et al.,
Respondents.
No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1934, etc. et al.,
Respondents.
No. 550.

BRIEF OF RESPONDENT, THE NATIONAL CITY BANK OF CLEVELAND.

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Respondents.

No. 550.

BRIEF OF RESPONDENT, THE NATIONAL CITY BANK OF CLEVELAND.

OPINIONS BELOW.

The Supreme Court of Ohio failed to write an opinion in either the Declaratory Judgment action (Case No. 549) or in the Quiet Title action (Case No. 550). Its orders dismissing the appeals made in both cases on the constitutional question and overruling the motions made to certify the record in both cases appear in the Transcript

of Record in the Declaratory Judgment action (hereinafter referred to as DJR) at pages 9 and 10, and in the Transcript of Record in the Quiet Title action (hereinafter referred to as QTR) at pages 16 and 17. The orders of the Supreme Court of Ohio denying applications for rehearing in both cases appear in DJR at page 9 and in QTR at page 17.

The Court of Appeals of Cuyahoga County, Ohio, delivered a single opinion covering both the Declaratory Judgment and the Quiet Title actions. This opinion was not reported but appears in DJR at pages 86 to 91, both inclusive, and in QTR at pages 76 to 81, both inclusive.

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio, in the Declaratory Judgment action, is reported at 51 O. L. A. 65, 80 N. E. (2d) 721, and further appears in DJR at pages 60 to 82, both inclusive. The Court of Common Pleas rendered no opinion in the Quiet Title action.

JURISDICTION.

The judgment and orders of the Supreme Court of Ohio dismissing the appeals and overruling the motions to certify the record were entered on October 20, 1948. The applications for rehearing in both cases were denied on November 10, 1948. The petitions for writs of certiorari were filed February 7, 1949. The jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code, as amended by the Act of June 25, 1948.

STATEMENT OF THE CASE.

The basic question raised by the petitions for writs of certiorari is whether it is a violation of due process of law for the courts of the State of Ohio to refuse to make an express adjudication of the validity or invalidity of a land trust created 25 years ago, even though the petitioning land trust certificate holders are the only persons who deny

its validity, even though Petitioners cannot possibly profit by a declaration of invalidity, and even though Petitioners and all other land trust certificate holders may suffer irreparable damage if the trust should be declared invalid. While it is difficult to understand why a question having so obvious an answer is being litigated at all, this Court will readily realize upon an examination of the admitted facts that such is the question before it, and that the present petitions are but the most recent steps along an abortive and meaningless trail of litigated cases which, if followed further, can lead nowhere except to the possible destruction of the very interests which the Petitioners presume to represent.

The trust which Petitioners seek to destroy was created in 1924, at which time there were issued to the public 2,000 shares of equitable ownership in the valuable commercial property known as the Citizens Building which comprises the trust *res*. (QTR 19, 20.) In 1933, after The Union Trust Company had closed its doors and the Superintendent of Banks of the State of Ohio in charge of the liquidation of The Union Trust Company had tendered its resignation as Trustee, The National City Bank of Cleveland was appointed Successor Trustee by the Court of Common Pleas of Cuyahoga County, Ohio. This appointment was made without opposition and with the written approval of the holders of land trust certificates representing 1,731 of the 2,000 shares of equitable ownership. (QTR 20, 21.)

In 1935, some two years after The National City Bank of Cleveland was appointed Successor Trustee, the Supreme Court of Ohio held by its decision in *Ulmer v. Fulton*, 129 O. S. 323, that a certain trust created by another bank located elsewhere in the State of Ohio was void on the ground that it had been created in a manner contrary to the public policy of the State of Ohio. In this decision the Supreme Court further held that since the bank was insolvent, the certificate holders were entitled to claims

as general creditors against the bank and could assert these claims against the Superintendent of Banks in charge of its liquidation.

Inasmuch as there were some elements of similarity between the trust involved in *Ulmer v. Fulton, supra,* and the trust created by The Union Trust Company, the Superintendent of Banks advised The National City Bank of Cleveland by letter dated August 3, 1936, that the case of *Ulmer v. Fulton* raised the question as to whether or not he had an interest in the property held by it as Successor Trustee. The Superintendent of Banks stated, however, that until the question of his interest was determined The National City Bank of Cleveland should continue to administer the trust according to its terms. (DJR 16.)

The Superintendent of Banks has at no subsequent time raised any further question as to the validity of the trust. Nor have any of the land trust certificate holders ever done so except the small and discordant minority who constitute the Petitioners in the present proceedings. Even this minority did not make any attack on the trust until 1942, some seven years after the decision in *Ulmer v. Fulton.* At that time they brought suit in the Court of Common Pleas of Cuyahoga County, Ohio, in what will hereinafter be referred to as the "*Hart* case," * seeking the same relief accorded to the certificate holders in *Ulmer v. Fulton.*

In 1937, some five years before the *Hart* case was instituted, the Ohio Legislature had enacted the so-called McIntyre Act (Section 710-92a, Ohio General Code),** which provided that in the case of an insolvent bank all general claims against it not appearing on its books would be forever barred from participation in any of the assets of the bank unless filed within a time to be fixed by the

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* *Stanley et al. v. Hart,* 29 Ohio Opinions 35 (1942).

** The McIntyre Act is set forth at length in Appendix A to the Petition for Writs of Certiorari.

Superintendent of Banks and published in a local newspaper of general circulation. Since the Superintendent of Banks had published this notice in the case of The Union Trust Company long before 1942 and none of the certificate holders had filed a claim within the time provided, the Court of Common Pleas held in the *Hart* case that the certificate holders were forever barred by the McIntyre Act from participating as general creditors in the assets of The Union Trust Company. In accordance with recognized judicial practice, the Court of Common Pleas therefore refused to decide the other questions raised by the action, such as the question of the validity or invalidity of the trust, since no useful purpose would be served thereby. The *Hart* case was heard *de novo* by the Court of Appeals of Cuyahoga County on the same record and with the same result and was later affirmed without opinion by the Supreme Court of Ohio.*

The dissident certificate holders who had instituted the *Hart* case were by no means satisfied with its outcome. Shortly after the Ohio Supreme Court rendered its decision in that case, they brought an action of mandamus, hereinafter referred to as the "*Cook* case," ** in which they prayed for a writ ordering the Superintendent of Banks to set the trust aside on the ground that it was void for the same reasons stated in *Ulmer v. Fulton*. Once again the Supreme Court of Ohio denied the relief sought, stating that the complaining parties had merely raised the same issues which had already been decided in the *Hart* case and that it did not intend to overrule the result reached therein.† It should be noted that in the *Cook* case the relators asserted that even though it had been decided in the *Hart* case that they were barred by the McIntyre Act from making any claim as general creditors of The Union Trust

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* 142 O. S. 528.

** *State ex rel. Stanley et al. v. Cook et al.*, 146 O. S. 348.

† Ibid, p. 368.

Company, certain equitable remedies would be available to them in the event the trust were declared void. The Supreme Court pointed out, however, that the equitable jurisdiction of the courts had been invoked in the *Hart* case without success and that, in any event, it did not believe that any equitable remedies were available.*

Once again the dissident certificate holders were not satisfied, nor did they apparently believe what the Ohio courts had said in the *Hart* and *Cook* cases. Shortly after the Ohio Supreme Court had rendered its decision in the *Cook* case, they brought a third action in which they sought a declaratory judgment as to the validity or invalidity of the trust. This action is one of the two suits which have been joined in this Court for the purpose of the petitions for writs of certiorari.

Demurrers to the Declaratory Judgment action were filed by all of the principal defendants, namely, The National City Bank of Cleveland, The Union Trust Company, the Superintendent of Banks and Union Properties, Inc. Another group of land trust certificate holders who were seriously disturbed at the repeated attacks on the validity of the trust were also allowed to intervene as defendants for the purpose of filing a demurrer as well. The grounds for the several demurrers are set forth in DJR at pages 26 to 29, both inclusive.

After a protracted hearing and the filing of extensive briefs by all parties, the Court of Common Pleas of Cuyahoga County sustained the demurrers and, when Petitioners as plaintiffs failed to plead further, dismissed the Declaratory Judgment action. The Court of Common Pleas wrote an extensive opinion in which it was concluded that "the matter of the validity or invalidity of the Trust is now an abstract and academic question, and as such is not subject to the action of a court of justice." (DJR 81.) In the course of its opinion, the Court fur-

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* Ibid, pp. 366, 367.

ther observed that "the plaintiffs in their petition do not claim that anyone but themselves are asserting the invalidity of the Trust" (DJR 75) and that they are accordingly "in as favorable a position as they can hope to be under all the circumstances present, and should *let well enough alone.*" (DJR 81.) The Court also pointed out that in so far as the petition raised the possibility of the invalidity of the trust, the plaintiffs were not "in a position to derive any benefit to themselves and the other holders of certificates upon a determination of invalidity." (DJR 81.)

Petitioners appealed from the judgment of the Court of Common Pleas to the Court of Appeals of Cuyahoga County. Extensive briefs were again filed and a full hearing was had. The Court of Appeals nevertheless unanimously affirmed the judgment of the lower court. (DJR 6.) In its opinion, the Court of Appeals, after reviewing the history and the results of the protracted litigation concerning the trust, succinctly summarized its grounds for affirming the lower court, saying that the Court was "not required to pass upon the validity or invalidity of the Trust of August 15, 1924, as no rights can depend upon such adjudication." (DJR 91.)

Petitioners took a further appeal to the Supreme Court of Ohio, and also filed a motion in the Supreme Court for an order directing the Court of Appeals to certify its record. Once again extensive briefs were filed; but the Supreme Court, after according to Petitioners a full hearing, dismissed the appeal and overruled the motion to certify the record. (DJR 9, 10.)

The second of the two suits which have been joined in this Court for the purpose of the petitions for writs of certiorari is a Quiet Title action instituted by The National City Bank of Cleveland as Successor Trustee, naming as parties defendant The Union Trust Company and its successors in interest, the Superintendent of Banks and Union Properties, Inc. It was intended by this action to eliminate

what has from time to time been termed "the tail-end position" of these defendants. This tail-end position arose out of certain rights reserved by The Union Trust Company in the original Agreement and Declaration of Trust dated August 15, 1924, by reason of which it was feared that The Union Trust Company and its successors in interest might have a claim upon a portion of the income from the trust property, even though The National City Bank of Cleveland had been appointed Successor Trustee. Neither the Petitioners nor any other certificate holder were initially made a party to this action, since they were concerned with the issue of the tail-end position only as beneficiaries of the trust and the action was brought by the Successor Trustee for the benefit of all beneficiaries, to assure the purity of the title to the trust property free of the tail-end position.

All of the defendants named by The National City Bank of Cleveland in its Quiet Title petition disclaimed in their answers any interest in the trust property, thereby paving the way for a decree quieting its title. Petitioners, however, were unwilling to accept the benefits which the Successor Trustee was seeking to bestow upon them and all other certificate holders by instituting the Quiet Title action. They insisted upon intervening in the case and filing an answer and cross-petition. In their answer, however, Petitioners did not make any direct claim to an interest in the trust property. They merely denied that The National City Bank of Cleveland as Successor Trustee had good title to the property and asserted that The Union Trust Company and its successors in interest, the Superintendent of Banks of the State of Ohio and Union Properties, Inc. "do have a claim in and to the property described in the petition which they should assert." (QTR 26.) In so far as the cross-petition was concerned, it merely set forth the same allegations previously made in the petition in the Declaratory Judgment action,

and prayed that the trust be found void, that the title and ownership of the property in question be found to be in the Superintendent of Banks as liquidator of The Union Trust Company, and that Petitioners be granted "such other and further relief to which they are entitled and which justice and equity demand." (QTR 33.)

The National City Bank of Cleveland, along with Union Properties, Inc., and the same group of additional certificate holders who had intervened in the Declaratory Judgment action, filed demurrers to the cross-petition. These demurrers were on the same grounds as were the demurrers to the petition in the Declaratory Judgment action.* The Union Trust Company and the Superintendent of Banks filed an answer to the cross-petition in which, after generally denying the allegations of the cross-petition, the answering defendants reviewed the previous litigation involving the validity of the trust and stated that they took no position with respect to that question except to point out that if the trust should be held invalid, the certificate holders would be completely deprived of their property.**

The National City Bank of Cleveland also filed a motion to strike the answer filed by Petitioners as intervening defendants in the Quiet Title action. Union Properties, Inc., moved to strike a portion of the answer as well. The grounds asserted in support of these motions appear in QTR at pages 42 to 46, both inclusive.

The Quiet Title action was joined with the Declaratory Judgment action for purposes of hearing upon the demurrers and motions. As in the Declaratory Judgment action, Petitioners were accorded a full hearing and the opportunity to file extensive briefs in support of their contentions. It was obvious, however, that they were merely seeking to raise once again the very same questions which had already been decided in the *Hart* and *Cook*

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* See QTR 44-47 and 50.

** QTR 38-41.

cases and which had also been raised in the Declaratory Judgment action. For presumably the same reasons which dictated the court's decision to sustain the demurrers to the Declaratory Judgment petition, the court accordingly sustained the demurrers to the cross-petition and struck Petitioners' answer. And since Petitioners did not elect to plead further either by way of answer or cross-petition, although they were given full opportunity so to do, the court thereupon dismissed the cross-petition and rendered the same judgment against Petitioners in the Quiet Title action as was rendered against all of the other defendants. (QTR 6-11.)

The Court of Appeals of Cuyahoga County and the Supreme Court of Ohio both accorded to Petitioners in the Quiet Title action the same full hearing and opportunity to file briefs as were accorded to them by these Courts in the Declaratory Judgment action, the two cases again being joined on appeal. However, both of the appellate courts reached the same decision as they had reached in the Declaratory Judgment action. (QTR 12, 13, 16, 17.)

ARGUMENT.

A. The Decree of Quiet Title was rendered after full hearing and consideration of the contentions of the Petitioners, was not violative of due process of law, but rather was in accordance with established principles of procedure and justice under the law.

The first argument made in support of the Petitions for Writs of Certiorari is that "it was a denial of due process for the state courts, in the Quiet Title action, to have stricken Petitioners' Answer, issued a Decree of Default against them and enjoined them from asserting their rights."

The Quiet Title action was instituted by The National City Bank of Cleveland, Successor Trustee, making as Parties Defendant to the action, The Union Trust Company, Union Properties, Inc. and the Superintendent of Banks. It was intended by this action to eliminate a possible right or claim of right of The Union Trust Company to share in the income of the trust property, the right or claim of right arising out of a provision of the trust indenture. Petitioners were not made parties to the action; the action was brought by the Trustee of their trust for the benefit of all beneficiaries to assure the purity of the title to the trust property free of any right or claim of right of others.

Petitioners, however, demanded the right to intervene and to raise the additional issue of the validity of the trust. The court granted them leave to intervene, become Parties Defendant, and file an Answer and a Cross-Petition. Petitioners say they have not been accorded due process of law in the pursuit of their rights, i.e., with respect to an issue which they attempted to create and inject.

The National City Bank of Cleveland, Successor Trustee, Union Properties, Inc., and another group of certificate holders who were also allowed to intervene and who were seriously disturbed at the attacks upon the trust by the Petitioners, all filed Demurrers to the Cross-Petition

of the Petitioners; and the National City Bank of Cleveland, the Successor Trustee, filed a Motion to Strike the Answer of these new Defendants. Briefs were filed by all parties, including the Petitioners as intervening Defendants. The matter came on for hearing on the Demurrer and the Motion to Strike and a full and protracted hearing was held in which Petitioners as intervening Defendants presented their briefs and arguments in support of the sufficiency of their Answer and their Cross-Petition. A number of substantial reasons were advanced by The National City Bank of Cleveland, Successor Trustee, and by the other parties to the action showing that the Cross-Petition of the Intervenors did not state a cause of action and that the claims of Petitioners should be denied. The court sustained the Demurrers.

There remained the Answer of Petitioners. By its express terms it denied the title of the Successor Trustee, asserted no right or claim of right in Petitioners in respect to the property which was the subject of the Quiet Title action, alleged that the trust in which the property was held was void and that, as a consequence, the property had never become a part of the trust estate. Petitioners thus convincingly proved by their own assertions in their Answer that they were neither necessary nor proper parties to the action which involved the sole question of eliminating any possible rights of The Union Trust Company.*

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* Under Ohio law an action to quiet title is brought under a special provision of the General Code of Ohio, Section 11901:

"An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse or estate interest; or such action may be brought by a person out of possession, having, or claiming to have, an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

(*Continued on following page*)

Even if Petitioners were found to be proper parties in the Quiet Title action, a fact which really ought not even to be assumed for purposes of argument, their general denial of the allegations of the Petition states no cause of action giving rise to a remedy. The courts of Ohio at the time when the Answer was filed had already decided in two previous cases involving the same trust that if the trust were declared void and the title to the property vested in the Superintendent of Banks as Liquidator of The Union Trust Company, no rights or interests of any nature whatsoever would accrue to the land trust certificate holders. In the *Hoyt* case it was held by the Court of Common Pleas, as indicated by syllabus No. 5 of the opinion in 29 Ohio Opinions 35, that:

"The failure of such land trust certificate holders to comply with the provisions of the McIntyre Act, pre-

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(*Continued from preceding page*)

Another section of the General Code of Ohio, 11255, prescribes those who may become parties to an action:

"Joinder of Defendants.—Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination and settlement of a question involved therein."

The right of persons to intervene in a lawsuit is discussed in 30 *O. Jur.* "Parties" Section 65, page 793:

"• • • Anyone who is a necessary or proper party defendant within the meaning of General Code, Section 11255, may properly intervene in an action in which he was not originally made a party, although it must be conceded that an intervenor must have an interest in the subject matter which (he) seeks to protect, that one cannot come into an action merely for the purpose of contesting the plaintiff's claim, nor can an entire stranger to a suit on his own motion, be made a party thereto in order to inject new issues into the controversy."

The Courts of Ohio in construing the Quiet Title statute have confirmed the rule that the proper and necessary parties to a Quiet Title action are only those who assert a present right or interest in the property which is the subject of the action: *Collins v. Collins, et al.*, 19 O. S. 468 (1869); *Sidney Telegraph Co. v. Farmers Telegraph Co.*, 11 O. N. P. n. s. 424.

cludes them from asserting claims as general creditors against the Bank."

This result was reiterated by the Supreme Court of Ohio in the *Cook* case, where it was stated by Judge Turner, writing the majority opinion, at page 366, that:

> "The effect of the *Hart* case was to deprive the relators permanently of any standing either legal or equitable, as creditors of The Union Trust Company on account of their holdings of said trust certificates."

Again at page 368 of the same opinion, Judge Turner says:

> "We can see no public interest in having this trust set aside when there has been finally and irrevocably determined in the *Hart* case that the *cestuis que trust-ent* have no standing as creditors of The Union Trust Company. Assuming the trust to be set aside, what would become of the trust assets if they were recovered on behalf of The Union Trust Company. There would indeed be a case creating an unjust enrichment, for the relators are barred from any claim against The Union Trust Company."

After a full and complete hearing in which Petitioners actively participated, the Court of Common Pleas accordingly found that Petitioners had no interest whatsoever in the property which was subject of the Quiet Title action except as beneficiaries of the trust. The Court therefore found Petitioners' Answer to be insufficient, struck the Answer from the record and, when Petitioners failed to plead further, rendered judgment against them.

It was after all of this consideration and judicial process that the Court proceeded to quiet the title to the property, *in which property the Intervenors had not claimed any direct interest whatsoever.*

Petitioners, in spite of all this, say that it was a denial of due process for the court to have stricken the Answer and to have rendered the Decree, that they did not have an opportunity to be heard, and that they did not have their day in court.

Petitioners' reference to *Restatement of Law of Judgments*, Section 6(f), does not support Petitioners' fantastic statement that striking an Answer from the files and rendering judgment by default is necessarily a denial of due process. Such is the case only if, as the *Restatement* points out, the defendant "was denied all opportunity to be heard."

The cases cited by Petitioners likewise fail to substantiate their claims. In *McVeigh v. U. S.*, 78 U. S. (Wall.) 259, a violation of due process of law was found to exist because of *a denial of an adequate hearing*. *Windsor v. McVeigh*, 93 U. S. 274, involved a violation of the constitutional right of due process of law, because the defendant's answer was arbitrarily stricken from the files on the ground he was a rebel and he was *denied any right to be heard*. In *Hovey v. Elliott*, 167 U. S. 409, the defendant's Answer was stricken and a default judgment rendered against him *without giving him any opportunity to present his case*. It is difficult to understand the applicability of these cases to one where the court allowed intervention, permitted the filing of pleadings, accorded due hearing upon the sufficiency of the same and finding them insufficient, struck them from the files.

Petitioners would have it appear that the court sustained the Demurrer and struck the Answer in a discriminatory manner because the court permitted another group of beneficiaries of the trust, who took a position contrary to Petitioners, to remain as Parties Defendant to the action. But these other Intervenors had merely filed a Demurrer to the Cross-Petition of the Petitioners. They took no position antagonistic to the gravamen of the action which was that the title to the real property held by the Trustee should be quieted against The Union Trust Company and its successors in interest. No Answer or other pleading was at any time interposed by these other intervening Defendants. They were heard only in respect to the Demurrer

which they filed against these Petitioners, who were attempting to inject the question of the Trustee's title to the property while at the same time failing to claim any direct interest therein.

All persons who had or claimed any right whatsoever in the property which was the subject of the Quiet Title action were thus before the court, were given every opportunity to file such pleadings as they saw fit, and were accorded a full hearing on the sufficiency thereof. Under the circumstances, there can be no valid complaint that the decision of the Ohio courts denied due process.

B. It is not a violation of due process of law to refuse to do a vain thing, to refuse to be drawn into any further inquiry or adjudication as to the validity of the trust.

Petitioners claim that they have never been accorded a remedy adjudicating the validity of their trust, that their property rights are left insecure and in peril, and that thus they have been denied due process.

The Petitioners, as we have previously stated and as shown by the record, are the owners of 43 out of 2,000 certificates of beneficial interest in the trust estate—a total investment of $43,000.00 out of $2,000,000.00. They are the only ones who express any fear that their property rights are insecure or in peril. The Successor Trustee, joined by a substantial group of certificate holders who have become alarmed by this continued litigation persistently carried on by this discordant minority in all the courts of Ohio, sees only insecurity and peril in these continued attacks by Petitioners. They believe that the only factors of insecurity lie in the undermining of confidence in the certificates, because of the activities of the minority group. There has never been shown any theoretical or practical possibility of advantage to the beneficiaries in these attacks, for a declaration of validity results in the certificate holders retaining that which they now have and always have had

in full measure; whereas a declaration of invalidity leaves them, according to the decisions of the Supreme Court of Ohio, with a claim against the liquidating bank which is definitely barred by the McIntyre Act and other applicable statutes of limitations.

Each certificate holder at the time of the creation of the trust received and holds to this day a land trust certificate which represents an equitable interest in the specific land he originally intended to purchase and which at all times has constituted the entire corpus of the trust estate. That land now is and always has been held for his use and benefit, and represents a very valuable asset belonging wholly to him and to the other certificate holders. An adjudication of the validity of the trust is not necessary in order to clear the title to the property. The Trustee already has a good and sufficient marketable title. There is no insecurity or peril except that which Petitioners are attempting to create.

Petitioners say that "A party's right to sue in a court having jurisdiction of the parties and cause of action, includes the right to prosecute his claim to judgment," citing *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 269. To this we entirely subscribe and call attention to the fact that in the Declaratory Judgment action, after full hearing on the Demurrer, Petitioners were found to have stated no cause of action. Upon review by the Court of Appeals, the action of the lower court was sustained. Upon Motion to Certify to the Supreme Court of Ohio, upon the briefs and oral argument, the motion was denied. This certainly represents a full and complete right to prosecute one's claim to judgment, and it certainly comprehends a full granting of due process of law.

It is said that "The state courts must under the Federal due process clause afford a party a remedy and a determination of his rights, citing *Brinkerhoff-Faris v. Hill*, 281

U. S. 673." It surely cannot be asserted that the facts and processes followed in the *Brinkerhoff* case are kindred in any respect to the instant cases where Petitioners were allowed full opportunity to be heard, and where it was found that in prior litigation Petitioners, after full hearing, had failed to state grounds for further consideration of the validity of the trust.

The Supreme Court of Ohio has twice before and also now in these actions found that it is useless and unnecessary to inquire further into the facts of the creation of the trust for the reason, among other things, that all remedies which conceivably might have been available, have been extinguished or previously denied.* So long as the courts can be persuaded to indulge in inquiries as extensive and protracted as have the courts on behalf of Petitioners, it can scarcely be stated that there has been a denial of due process of law.

C. All remedies have been extinguished or previously denied by courts of competent jurisdiction, and there remain no further requirements of due process of law.

Under the heading "Analysis of Ohio Courts' opinions" Petitioners demonstrate again the futility of their efforts to find in the record of these two cases, or in previous litigation in connection with this trust, a violation of due process of law.

Petitioners say that their ultimate objective is to have a claim against The Union Trust Company; that they prefer to have such a claim instead of their trust and their

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* The possible remedies which might arise out of a declaration of invalidity of this trust or any such trust were analyzed in detail in our Brief before the Supreme Court of Ohio. The analysis brings one to the necessary conclusion, also arrived at by the lower court and in the subsequent reviews by the higher courts, that all possible remedies are unavailable. A synopsis of the analysis of remedies may be found in the Appendix at the end of this Brief.

present possession and ownership of the corpus of the trust. Petitioners predicate their opportunity to acquire such a claim on the assumption that the trust will be found to be the same kind of a trust as that involved in the case of *Ulmer v. Fulton*; that it will therefore be adjudged invalid; and that they will thereupon acquire rights as general creditors which may be asserted against The Union Trust Company and its successors in interest, in spite of the McIntyre Act and other applicable statutes of limitations, and in spite of the previous decisions of the Supreme Court of Ohio in the *Hart* and *Cook* cases that the McIntyre Act bars recovery. The Petitioners attempt to surmount these difficulties by saying that their right of claim will exist for the first time only upon a declaration of invalidity of the trust and that, as a consequence, the period of limitation of the McIntyre Act and all other statutes of limitations operate and begin to run only from that time; that the bank, acquiring the property, the corpus of the trust, would be unjustly enriched; and that equity would give relief against the legal bar of the statute of limitations.

The obstacles in the path of Petitioners are momentous. Contrary to this small minority group, the Successor Trustee and all others, including the Ohio courts, believe that the facts of the creation of the trust are not kindred to the facts of the *Ulmer* case upon which Petitioners rely, and recognize that the trust is valid. We believe the sole rights of the beneficiaries of an invalid trust, if found to have been improperly created by the bank, are as general creditors of the bank. The Supreme Court of Ohio has so decided. We believe that the McIntyre Act precludes any recovery on any such claim. The Supreme Court of Ohio has so decided.* We find the law to be quite clear and decisive that statutes of limitation run against all remedies which might be available from a void trust, not from the time of a declaration of invalidity, but from the

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* *Stanley v. Hart*, 142 O. S. 528.

time of creation of the trust.* This trust was created in 1924, more than twenty-one years prior to the filing of these suits. Thus, every conceivable remedy has been barred. Unjust enrichment, a form of equitable relief, is available as a remedy only when there are no adequate remedies at law.

Due process does require that the court give consideration to issues which affect rights and property. There cannot be any failure of the required processes of law where upon due hearing and consideration under the usages at law and in equity, it is found that the requests of Petitioners must be denied because they give rise to no right or remedy.

D. The property rights of the beneficiaries of the trust are fully established.

It is said that a judicial determination of the trust is necessary to prevent impairment and possible loss of the property rights of the beneficiaries of the trust. It is said that "due process requires that the court put an end to the uncertainty of the beneficiaries' property rights by determining whether the trust was valid or invalid." Any uncertainty which might have existed has long since been dissolved. The Supreme Court of Ohio has now four times had before it issues involving the validity of the trust. In each case by refusing to disturb the trust it has recognized and accepted it. It stands, except for the attacks of this small group of certificate holders, as being valid, subsisting and inviolate. The Courts have found any further discussion of the subject of validity or invalidity to be academic and abortive. The certificate holders already have all that can be obtained. The certificate holders cannot now be deprived of their trust or their trust property, nor

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* *Pelton v. Bemis*, 44 O. S. 51; *Grossbeck v. Cincinnati*, 51 O. S. 365; *Fidelity & Deposit Co. v. F. & C. Bank*, 72 O. App. 432; *Leather Manufacturers Bank v. Merchants Bank*, 128 U. S. 26.

can the marketability or the value of the trust property be impaired or diminished, since the title and ownership thereof has been confirmed by the court of last resort in Ohio.

Respectfully submitted,

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APPENDIX.

ANALYSIS OF REMEDIES.

To warrant the making of a determination of the validity or invalidity of the trust in question, there must be alleged facts which show the right to invoke the powers of the court for such an adjudication. Otherwise, the Petition in the Declaratory Judgment action and the Cross-Petition in the Quiet Title action are subject to Demurrer. It will be found that all conceivable remedies have been extinguished or previously denied.

(a) The remedy of a right or claim against the Superintendent of Banks has been irrevocably denied by this Court.

The case of *Ulmer v. Fulton, supra,* which is obviously the basis for Petitioners' contentions, holds that if a trust is found to be invalid, the holders of certificates are deemed general creditors. Syllabus 4 of *Ulmer v. Fulton* reads as follows:

> "Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors."

It thus appears that if, either in the Declaratory Judgment action or in the Cross-Petition in the Quiet Title action, the Petitioners were able to make allegations and prove facts to show that the original trust was invalid, they would be relegated to the sole remedy of a right or claim against The Union Trust Company or the Superintendent of Banks. But there had been already in two instances a full and final adjudication by the Supreme Court to the effect that if such a claim ever existed, it has been now extinguished, and any recovery on the basis of a personal claim against the Superintendent of Banks forever barred.

This fact is certainly apparent and ought to be beyond question from a reading of the opinions of this Court in the cases of *Stanley, et al. v. Hart, supra*, and *State, ex rel. v. Cook, supra.*

In *State, ex rel. Stanley v. Cook, supra*, Judge Turner says at page 368:

> "We can see no public interest in having this trust set aside when there has been finally and irrevocably determined in the *Hart* case that the *cestuis que trust-ent* have no standing as creditors of The Union Trust Company. Assuming the trust to be set aside, what would become of the trust assets if they were recovered on behalf of The Union Trust Company. There would indeed be a case creating an unjust enrichment, for the relators are barred from any claim against The Union Trust Company."

Again, Judge Turner said at page 370:

> "The effect of granting a writ [of Mandamus] in this case would be to command the Superintendent of Banks in disregard of a statutory instructor (Section 710-95, General Code) to proceed to present an action against The National City Bank to recover the Citizens Building property. Just what statute the Superintendent would follow has not been pointed out. Surely not Section 710-95, General Code, for under that statute it is his duty to follow the instruction of the Common Pleas Court in Case No. 392938, entitled 'In the Matter of the Liquidation of The Union Trust Company.' * * *"

Again, at page 373, Judge Turner says:

> "In the *Hart* case relators here had a plain and adequate remedy in the ordinary course of the law authorized by Section 710-92 and Section 710-95, General Code. They lost there not because the action was not properly brought but because their claims had not been filed within the time limited by the law.
>
> "The Banking Act (Section 710-89, *et seq.*, General Code) provides a plain and adequate procedure for the liquidation of banks and the determination of all

claims arising in the course of such liquidation. See *Commercial Bank & Savings Co. v. Woodville Savings Co.*, 126 O. S. 587, 186 N. E. 444."

Petitioners would, at the most, therefore be in the position of general creditors if the trust were invalid, since they would be conclusively precluded from asserting any such claims as general creditors, their Petition in the Declaratory Judgment Action and Cross-Petition in the Quiet Title case did not state a cause of action.

(b) The McIntyre Act, a part of the Banking Act of Ohio, expressly bars any recovery.

By its express provisions and by all interpretations thereof the McIntyre Act clearly precludes the assertion by Petitioners of claims as general creditors of The Union Trust Company in liquidation.

Stanley, et al. v. Hart, 29 O. O. 35, Syllabus 5, reads as follows:

> "The failure of such land trust certificate holders to comply with the provisions of the McIntyre Act (Section 710-92a, General Code), precludes them from asserting claims as general creditors against the bank."

(c) No remedy is available because the question of validity is res judicata.

In 1933, after the closing of The Union Trust Company, the Court of Common Pleas of Cuyahoga County, pursuant to an application by the Superintendent of Banks, appointed The National City Bank of Cleveland as Successor Trustee. In that connection the court made an order authorizing and directing the Superintendent of Banks:

> "* * * to convey the premises prescribed in said Agreement and Declaration of Trust * * * together with all right, title and interest of The Union Trust Company * * * unto said The National City Bank of Cleveland as Trustee upon the trusts and subject to the terms

and conditions of said Agreement and Declaration of Trust dated August 15, 1924."

The Banking Act, in connection with any such application, prescribes the method, which is an exclusive one, by which an order thus entered in general liquidation proceedings may be attacked. Thus, the last paragraph of General Code 710-95 reads:

> "No order of the Common Pleas Court or judge thereof entered pursuant to this section shall be deemed a final order; but by leave of court an independent suit may be brought not later than five days after such order is entered by any person deeming himself aggrieved thereby, to restrain any action thereby authorized."

None of the certificate holders, nor anyone else, has ever sought to attack the transfer to the Successor Trustee. All stockholders, creditors of the bank and other interested parties were bound to take notice of any act done in the liquidation proceedings. Under the express provisions of the statute, any action by a stockholder, creditor or other interested party to prevent compliance with the order of the court had to be taken within five days after the order was entered. There is nothing in the Petition for Declaratory Judgment or in the Cross-Petition in the Quiet Title action asserting that such action was taken, and no such allegation could be made, since it would have been contrary to fact.

If the prior action of the Common Pleas Court in ordering the transfer of the property is no longer subject to attack or review, then the title of the Successor Trustee is inviolate, and, consequently, the validity or invalidity of the trust is no longer the subject of controversy. The Petitioners, not having any remedy available to them, cannot be said to have stated a cause of action, either in the Declaratory Judgment action or the Quiet Title action. The complaining certificate holders, thus being concluded,

have no right or interest in the property except through the Successor Trustee, which, in any event, would seem to be all they ever intended to acquire.

(d) There is no remedy under recoupment or unjust enrichment.

If by any chance the Court could take jurisdiction to inquire into the validity of the trust and the trust was determined to be invalid, we have previously found that all rights or claims against the Superintendent of Banks are irrevocably concluded. What, if any, rights in such case would the Appellants have in respect to the property which is the subject of the trust?

At the outset it will be recognized that any recovery based upon the theory of recoupment or unjust enrichment would be available only if the Petitioners had not had an adequate and complete remedy at law. Such a remedy was expressly given under the Ohio Banking Act had they seen fit to avail themselves of it by making a timely claim with the Superintendent of Banks. If the Superintendent had denied the claim on the grounds that the trust was not kindred to the type of trusts contemplated under the *Ulmer* and *Haggerty* cases, they could have followed the statutory procedure and filed an independent action to gain a further adjudication of their claimed rights, but they did not do that which the law required of them. Equity will not intervene in cases in which the Legislature has prescribed fair and adequate remedies of law which govern the rights of parties. Equity will not create new substantive rights under the guise of doing equity.

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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, *et al.*,

Petitioners,

vs.

THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, *et al.*,

Respondents.

No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, *et al.*,

Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc. *et al.*,

Respondents.

No. 550.

BRIEF OF RESPONDENTS, HAROLD B. BURDICK, THE FIRST CENTRAL TRUST COMPANY, TRUSTEE UNDER THE DEED OF TRUST OF FREDERICK W. WORK, HENRY W. MATHEWS, ALICE L. SCOTT AND RALPH STICKLE, SUCCESSOR TRUSTEE UNDER THE WILL OF ANDREW J. BAUSE, DECEASED.

IDENTITY OF THESE RESPONDENTS.

For six years the owners of certain land trust certificates in the trusteeship covering a parcel of down-town Cleveland real estate had maintained a series of suits

(which they lost in every court), attacking the validity of the trust, and seeking to establish the rights of all certificate holders as general creditors of the defunct The Union Trust Co.

The suits were all brought as class actions on behalf of all the certificate holders. The petitioners in the two cases in this Court are some of the certificate holders who initiated this eight-year plague of litigation, and they still profess to represent all certificate holders, including these respondents.

After the decisions in *Stanley et al. vs. Hart et al.*, 142 O. S. 528; 53 N. E. (2nd) 197, and in *Stanley et al. vs. Cook et al.*, 146 O. S. 348; 66 N. E. (2nd) 207 (hereinafter referred to as the *Hart* case and the *Cook* case) these respondents, and many other owners of the land trust certificates, were confirmed in their belief that the status of all certificate holders had been fixed, all being recognized equally by the trustee as beneficial owners of the trust property, and that in no event could the certificate holders ever become general creditors in the liquidation of The Union Trust Company.

Therefore when part of the same group (hereafter referred to as the "Alburn group") filed the declaratory judgment action and asked and were permitted to intervene as defendants in the quiet title action of the successor trustee, these respondents as the owners of 33 certificates of participation issued under the declaration of trust referred to in the petition and opinions of the lower court (DJR 60, 86; QTR 76),* were allowed to intervene in both cases, asserting that *they* represent the real interest of all the certificate holders; that the litigation fostered by the Al-

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* Pet—Refers to Petition for writs of certiorari and supporting brief.

DJR—refers to pages of Record in Declaratory Judgment case (No. 549).

QTR—refers to pages of Record in Quiet Title case (No. 550).

burn group had been determined four years before by the Supreme Court of Ohio; that the rights of all the certificate holders had been fixed and that the new litigation was useless and unjustifiable.

Later The Cleveland Trust Company, owning some 160 certificates, and the owners of 77 other certificates sought to intervene in these two suits in order to oppose the petitioners (DJR 30-1-3; QTR 52, 3, 5) but permission was denied because, as the court stated, their viewpoint is being presented by these respondents (hereafter referred to as the "Burdick group").

The Burdick group we believe represent the real interest of all the certificate holders and join with the other respondents in asserting:

(a) That the decisions of the lower courts were sound and just under the State law;

(b) That in view of the fact that the petitioners had a full and fair hearing in these cases with respect to the subject matter brought before the courts, no Federal question is presented as a basis for allowance of the writs prayed for.

We offer brief discussion of this matter here in order to minimize repetition of matter brought to the court's attention in the briefs of the trustee, The National City Bank of Cleveland and Union Properties, Inc., the other respondents in these cases. This brief will be directed to the two cases referred to in the joint petition filed in this Court.

FACTS WHICH WERE BEFORE THE OHIO COURTS.

Counsel for other respondents have shown that the *Hart* and the *Cook* cases both involved the same subject matter and the same parties as the Declaratory Judgment and the Quiet Title actions under consideration.

Also they have shown that it is the established law of Ohio that a court will take judicial notice of the record and

proceedings in a case previously before it involving the same subject matter and the same parties.

Therefore the voluminous records in the *Hart* case were before the Supreme Court of Ohio in the *Cook* case and the records of both cases were before it in the instant litigation.

STATEMENT OF FACTS.

The records in the litigation among the parties to this action show that:

1. In 1933 after The Union Trust Company of Cleveland was closed for liquidation holders of 86.55 per cent of the entire land trust certificate issue of 2000 participations in this trust consented to the transfer of the trusteeship to The National City Bank of Cleveland, the present trustee. Every certificate holder had notice, and no one objected. (*Cook* case, 146 O. S. at page 362.)

2. On April 24, 1935 in *Ulmer vs. Fulton*, 129 O. S. 323; 195 N. E. 557 the Supreme Court of Ohio announced its decision that a certain mortgage trust created by a bank out of its own property was invalid, and that the beneficial owners of the trust became general creditors of the bank, then in liquidation.

3. For many months following the *Ulmer* decision *supra*, the certificate holders held meetings to discuss whether it would be to their financial advantage to attempt to invoke the *Ulmer* decision and ask to become general creditors of The Union Trust Company or to retain their interest in the trust property. They took no action because they were doubtful where their advantage lay. (*Cook* case, 146 O. S. at pages 362-3.)

4. On April 21, 1937 Sec. 710-92a General Code of Ohio, the "McIntyre Act," went into effect. Under its terms the Superintendent of Banks of the State of Ohio fixed July 17, 1937 as the last day on which general claims could be filed against The Union Trust Company. No

certificate holder before or since July 17, 1937 up to October 1945 had filed with the Superintendent a claim based on the invalidity of the trust. (*Cook* case, 146 O. S. at pages 360-1.)

5. On Jan. 20, 1941, certain holders, many of whose certificates were bought in the open market *after* July 17, 1937, filed an action in Common Pleas Court of Cuyahoga County, Ohio (the *Hart* case) praying that the trust be found to be void; that The National City Bank as trustee be ordered to convey the trust property to the Superintendent of Banks; and that the certificate holders be found to have general claims against the assets of the bank in liquidation. (*Cook* case, 146 O. S. pages 351, 2, 9 and 360.)

6. On Feb. 9, 1944 the *Hart* case was decided by the Supreme Court of Ohio. In commenting on this decision Judge Turner said in the *Cook* case, 146 O. S. at page 366:

> "The effect of the *Hart* case was to deprive the relators (which means all certificate holders) permanently of any standing, either legal or equitable, as creditors of The Union Trust Company on account of their holding of such certificates. * * * The status of the relators as possible creditors of The Union Trust Company, right or wrong, has now been forever determined by that case." (Parenthetical clause is ours.)

7. On April 27, 1944 the *Cook* case itself was filed by the same group of certificate holders, as a class action in an original mandamus proceeding in the Supreme Court of Ohio. They asked that the Superintendent of Banks be ordered to treat the trust as void. The writ of mandamus was denied.

Judge Turner said (*Cook* case, 146 O. S., page 373):

> "In the *Hart* case relators here had a plain and adequate remedy in the ordinary course of the law, authorized by Sec. 710-92 and Sec. 710-95 General Code. They lost there not because the action was not properly brought but because their claims had not been filed within the time limited by law."

"The Banking Act (Sec. 710-89 *et seq.*) provides a plain and adequate procedure for the liquidation of banks and the determination of all claims arising in the course of such litigation."

8. On May 6, 1946, the Alburn group (a part of the group which brought the *Hart* and *Cook* suits) filed as a class suit the Declaratory Judgment action, one of the cases here involved. (DJR 1.)

On July 10, 1946 the Common Pleas Court of Cuyahoga County, Ohio allowed the Alburn group to intervene and file an answer and cross-petition for the class in the Quiet Title action, also now before this Court. (QTR 25.)

9. On April 10, 1947 these respondents (the Burdick group of certificate holders) asked and later were granted leave to intervene in both cases, and to file demurrers to the petition in the Declaratory Judgment action and to the answer and cross-petition in the Quiet Title action. (DJR 28-29; QTR 49-50.)

10. In its opinion in passing on the demurrers, the trial court said:

"However under the settled law in the matter, the holders of Land Trust Certificates in connection with the Trust under consideration here are forever barred from asserting claims as general creditors of said Union Trust Company in liquidation. *Stanley et al. v. Hart*, 29 O. O. 35, affirmed in 142 O. S. 528. (DJR 71-2.)

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"A. L. Burdick, *et al.*, intervening parties defendants, oppose the position of plaintiffs in this matter. They represent all holders of certificates similarly situated to themselves. It is significant that all certificate holders do not see eye to eye in a matter instituted ostensibly for the benefit of all. Can it be that the intervening defendants see more clearly the direction in which their best interests lie?

"The holders of certificates have the beneficial ownership of a select piece of Cleveland real estate. The Successor Trustee is an outstanding and reputable

banking concern. They are in as favorable a position as they can hope to be under all the circumstances present, and should let well enough alone.

"It therefore appears to the Court that the matter of the validity or invalidity of the Trust is now an abstract and academic question, and as such is not subject to the action of a court of justice." (DJR 81.)

ATTEMPTS TO GET COURTS TO OVERRULE HART CASE.

Under Ohio law all of the evidence, pleadings and decisions in the *Hart* and *Cook* cases were before the Supreme Court of Ohio when motions to certify the records herein were before it.

The history of the effort by petitioners, a small group of certificate holders, to get the courts to overrule the *Hart* case and to upset a trusteeship in which their interest as beneficiaries always has been recognized and protected, was known to the lower court by reason of the previous litigation before it.

It has been known to every Ohio court that has spent time on this litigation since Feb. 19, 1944 when the *Hart* case was finally decided. Nor have the courts been slow to give a name to the efforts of petitioners. Following the first full-dress assault Judge Turner said:

"Relators in plain words are asking this Court now to overrule the *Hart* case."

(*Cook* case, 146 O. S. 368.)

The instant cases represent the second and third efforts. The Court of Appeals in its opinion covering both suits says:

"It is also our view that in these cases plaintiff's petition in the declaratory judgment case and the cross petition in the quiet title case constitute an attempt to secure the overruling of the decision in the *Hart* case." (QTR 80.)

The Supreme Court of Ohio also was in a position to know and properly could take cognizance of the fact that

these suits are additional and costly moves in the long battle to get it to overrule not only the *Hart* case, but a vital part of the *Ulmer* case, *supra*.

In 1935 the *Ulmer* case had decided (Syllabus 4):

> "Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors."

In 1944 the *Hart* case had decided that even if the trust which had been attacked by the Alburn group were found to be invalid, the certificate holders could not be general creditors because they had not filed claims before the deadline established by the McIntyre Act, July 17, 1937.

The Ohio courts, to have found for the petitioners, not only would have been faced with the necessity of overruling the *Hart* case, but also would have been forced to overrule that part of the *Ulmer* case which fixed the rights of beneficiaries of an invalid trust as general creditors.

THE DECISIONS OF THE LOWER COURTS WERE RIGHT.

The *Hart* case had reaffirmed the proposition laid down in the *Ulmer* case that if the certificate holders in this trust could have had any rights against the liquidating bank it would have been as general creditors.

The *Hart* case had established the proposition that these certificate holders could not become general creditors, and the *Cook* case had confirmed it.

The validity of the trust in the 22 years of its existence had not been questioned by anyone except the petitioners. It is not claimed that any other person has questioned it.

In such a situation we submit that the courts were right in sustaining the demurrers on the ground that no cause of action was stated; that the courts were being asked to decide a purely academic question.

In the Quiet Title action petitioners in their cross petition flatly stated that the title and ownership of the property was in the Superintendent of Banks (QTR 32).

Petitioners were therefore again trying to relitigate the issues of the *Hart* case, that is, have the courts declare the trust to be invalid.

While claiming no title or interest in the property for the certificate holders, they are trying to induce the courts to take title from the trustee and give it to a third person, the Superintendent, with whom they claimed no privity. Not claiming any interest in the property the demurrers were properly sustained.

CONSTITUTIONAL RIGHTS OF PETITIONERS WERE NOT VIOLATED.

The petitioners were given full and complete hearings on both actions in all the Ohio courts.

They refer constantly to their "rights," but do not show that any of their constitutional rights have been violated in the normal and ordinary procedure under the Statutes of Ohio.

They say they were "expelled" from the cases. This is their characterization of the fact that they stood on pleadings, found by the Ohio courts to be demurrable, and that, not desiring to plead further, they were non-suited.

Petitioners assert that it was a denial of due process for the Court of Common Pleas to strike the petitioners' answer in the Quiet Title action, although the Burdick group were allowed to remain in the suit. (Pet. 18-19-20.)

The Burdick group, although taking the position that the certificate holders were not proper parties to the Quiet Title action, were allowed to intervene, after another branch of the court had admitted the petitioners.

The Burdick group asserted that they, and not the petitioners, represented all the certificate holders, and accord-

ingly they joined with other respondents in demurring to the answer and cross petition of petitioners.

The demurrers were sustained and on the motion of other respondents the answer of the petitioners was stricken, because it did not state a defense to the trustee's petition. Not desiring to plead further, the court had no alternative except to enter the decree which it did in the Quiet Title action.

Of course the case of *Hansberry vs. Lee,* 311 U. S. 32; 85 L. Ed. 22, cited by petitioners (Pet. 20), is not even remotely an authority for their proposition that the above action was a denial of their right of due process.

In *Hansberry vs. Lee* the first paragraph of the opinion tells the story (page 37):

> "The question is whether the Supreme Court of Illinois, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment."

The court found that the "earlier litigation" had not been a class action insofar as the petitioners were concerned and that they had been denied due process when the state courts held they were bound by the judgment therein.

CONCLUSION.

Petitioners obviously entertain the hope that if some court will hold that the trust was invalid when created 25 years ago, some magic way can be found to give the certificate holders some rights in the remaining assets of The Union Trust Company, without regard to the fact that the nature of such rights was fixed by the *Ulmer* decision in 1935 and that the possibility of establishing such rights was lost in the *Hart* case in 1944.

Meanwhile petitioners and all certificate holders have been confirmed in their beneficial ownership of the trust property, unchallenged for 25 years by anyone except the Alburn group themselves.

We respectfully submit that no rights of the certificate holders have been infringed; that no certificate holders have been "expelled" from the cases, that no right of due process has been violated, and that no Federal questions are here involved. The petitions for writs of certiorari should be denied.

Respectfully submitted,

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